JAN 23 1974

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. 73-557

BILLY JENKINS,
Appellant,

v.

STATE OF GEORGIA,
Appellee.

JOINT APPENDIX

On Appeal From the Supreme Court of Georgia

Jurisdictional Statement Filed September 27, 1973
Probable Jurisdiction Noted December 10, 1973

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APPENDIX

PART I

RELEVANT DOCKET ENTRIES IN PROCEEDINGS BELOW

IN THE SUPERIOR COURT OF DOUGHERTY COUNTY, STATE OF GEORGIA

STATE OF GEORGIA, *Plaintiff*,
v.
BILLY JENKINS, *Defendant*.

CASE NUMBER 24,883
TRANSCRIPT OF CRIMINAL DOCKET ENTRIES

DATE	DOCKET ENTRY
1972	
March 6	Arrest Warrant
March 6	Accusation
March 20	Demurrer to Accusation
March 20	Order Overruling Demurrer
March 22	Nol Prossed as to Woodall
March 23	Verdict of Guilty as to Jenkins
March 23	Sentence
April 21	Notice of Appeal
November 21	Order to Transmit Film and Physical Evidence

IN THE

SUPREME COURT OF GEORGIA

BILLY JENKINS,
Appellant,
v.
STATE OF GEORGIA,
Appellee.

No. 27692
TRANSCRIPT OF
DOCKET ENTRIES

DATE	DOCKET ENTRY
1972	
December 1	Notice of Appeal
December 1	Trial Court Clerk's Transcript
December 1	Trial Court Reporter's Transcript
December 1	Receipt of the Film and Three (3) Cartons of Exhibits
December 18	Enumeration of Errors
December 19	Brief of Appellant Submitted
1973	
January 18	Brief of Appellee Submitted
July 2	Opinion and Judgment
August 15	Remittitur to Trial Court Clerk
September 20	Notice of Appeal to United States Supreme Court
September 26	Film and Three (3) Cartons of Exhibits Transmitted to the United States Supreme Court

APPENDIX

PART II

PORTIONS OF STATE COURT RECORD RELATING TO QUESTIONS PRESENTED

[Arrest Warrant]

WARRANT

THE STATE
VERSUS

Billy Jenkins

Charge VIOLATION GEORGIA CODE SECTION 26-2105

Lynn L. Stout Prosecutor

The above defendant made bond on the ____ day of _____, 19__

Sheriff's Office

WITNESS:

Lynn L. Stout - Investigator

J. Wayne Parrish - Investigator

Warrant delivered to sheriff's office

Date February 10, 1972

GEORGIA, Dougherty County

Personally Comes Lynn L. Stout Who, on oath, says to the best of his knowledge and belief Billy Jenkins did, in said County, on the 9th day of February, 19 72, commit the offense of violation of Georgia Code Section 26-2105. And deponent makes this affidavit that a warrant may issue for his arrest.

_____ (Seal)

Sworn to and subscribed before me 10th day of February, 19 72

_____

Judge City Court, Albany, Georgia

GEORGIA, Dougherty County

To any Sheriff, Constable or Marshal of said State—GREETING:

Lynn L. Stout Makes oath as above which is hereby made part of this warrant. You are hereby commanded to arrest Billy Jenkins and bring him before me or some other judicial officer of said County to dispose of as the law directs. Fail not.

Witness my hand and seal February 10, 1972.

_____ (Seal)

Judge City Court, Albany, Georgia

A commitment hearing was held this _____ day of _____ 19____ and after hearing evidence it is ordered that the defendant be committed for said offense in default of his giving bond, with good security, in the sum of _____ Dollars for his appearance at the Superior Court to be held on the third Monday in _____ 19____.

Witness my hand and seal _____ 19____.

_____

Judge Pro Hac Vice City Court, Albany, Georgia

[Accusation]

No._____

SUPERIOR COURT,
DOUGHERTY COUNTY

March Term, 19 72

THE STATE
vs.

Billy Jenkins

DISTRIBUTING OBSCENE MATERIAL

ACCUSATION

Foreman.

ROBERT W. REYNOLDS,
District Attorney

Lynn Stout

Prosecutor.

Received in Open Court from the sworn Grand Jury Bailiff, and filed in office this 6th day of March 19 72.

Clerk.

GEORGIA, DOUGHERTY COUNTY:

THE GRAND JURORS, selected, chosen and sworn for the County of Dougherty, to-wit:

I _____ Foreman.

Robert W. Reynolds, District Attorney,

on information of Lynn Stout

In the name and behalf of the citizens of Georgia, charge and accuse Whitfield Woodall and Billy Jenkins with the offense of Distributing Obscene Material for that the said accused, in the County aforesaid, on the 13th day of January, Nineteen Hundred and Seventy-Two, did then and there knowingly exhibit a motion picture to the general public which motion picture contained conduct showing (a) an act of sexual intercourse, (b) a lewd exposure of the sexual organs, (c) a lewd appearance in a state of partial or complete nudity, (d) a lewd caress or indecent fondling of another person

contrary to the laws of said State, the good order, peace and dignity thereof.

ROBERT W. REYNOLDS, District Attorney

STATE OF GEORGIA v. WHITFIELD WOODALL and BILLY JENKINS, *Defendants*	ACCUSATION NO. 24883 DOUGHERTY SUPERIOR COURT MARCH TERM, 1972

Come now the defendants in the above identified and numbered accusation, prior to arraignment, and demur to the same as follows:

1.

Defendants demur generally to the accusation, as a whole, upon the ground that the same does not allege the commission of any criminal offense under the Law of the State of Georgia.

2.

Defendants demur generally to the accusation, as a whole, upon the ground that the same does not allege the commission of any criminal offense under the Law of the State of Georgia, as such law is restricted by the First Amendment to the United States Constitution as applied to the State of Georgia through application of the Fourteenth Amendment to the United States Constitution.

3.

Defendants demur generally to the accusation, as a whole, upon the ground that the same does not allege, as an essential element of the purported crime,

the language contained in Section 26-2101(b), Criminal Code of Georgia, as follows:

> "(b) Material is obscene if considered as a whole, applying community standards, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and utterly without redeeming social value and if, in addition, it goes substantially beyond customary limits of candor in describing or representing such matters."

4.

Defendants demur generally to the accusation as a whole, as being violative of the First Amendment of the United States Constitution, Code of Georgia 1933, Section 1-801, as applied to the State of Georgia through application of the Fourteenth Amendment of the United States Constitution, Code of Georgia 1933, Section 1-815, in that the Georgia statute upon which the said accusation is based, Section 26-2105, Criminal Code of Georgia, as amended, and Section 26-2011, Criminal Code of Georgia, fails to include as an essential element of the purported crime the following language:

> "Material is obscene if considered as a whole, applying community standards, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and utterly without redeeming social value and if, in addition, it goes substantially beyond customery limits of candor in describing or representing such matters."

5.

Defendants demur generally to said accusation as a whole, in that the Georgia statute upon which the same is based, Section 26-2105, Criminal Code of Georgia, and Section 26-2011 of the Criminal Code of Georgia, renders the conduct described in said Section 26-2105, as defined in said Section 26-2011, a crime by equating public conduct as defined in said Section 26-2011, with non-public conduct, as defined by said Section 26-2105, in violation of constitutionally protected freedom of expression as defined by the First Amendment to the United States Constitution, Section 1-801, Georgia Code 1933, as applied to the State of Georgia through application of the Fourteenth Amendment to the United States Constitution, Section 1-815, Georgia Code 1933.

6.

Defendants demur generally to the accusation as a whole, in that the Georgia statute upon which the same is based, Section 26-2105, Criminal Code of Georgia, construed in connection with that portion of Section 26-2101, Criminal Code of Georgia, relating to the definition of the word "knowing", is violative of the First Amendment of the United States Constitution, Section 1-801, Georgia Code 1933, as applied to the State of Georgia through application of the Fourteenth Amendment to the United States Constitution, Section 1-815, Code of Georgia 1933, in that said Georgia statutes deprive defendants of First Amendment freedom of expression by burdening defendants with self-censorship.

WHEREFORE, defendants pray that each and every ground of this demurrer be inquired into and sustained, and the accusation dismissed.

SMITH, GARDNER, WIGGINS, GEER & BRIMBERRY:

By: /s/ Peter Zack Geer
PETER ZACK GEER,
Of Counsel for Defendants

/s/ Charles F. Hatcher
CHARLES F. HATCHER,
Of Counsel for Defendants

STATE OF GEORGIA	ACCUSATION NO.
v.	24883
WHITFIELD WOODALL	DOUGHERTY
and BILLY JENKINS,	SUPERIOR COURT
Defendants	MARCH TERM, 1972

The demurrer filed by the defendants prior to arraignment on this date, is hereby overruled, and each and every ground of said demurrer is hereby overruled.

SO ORDERED and ADJUDGED this 20th day of March, 1972.

/s/ Asa D. Kelley, Jr.
Judge, Superior Court,
Dougherty Judicial Circuit

**IN THE SUPERIOR COURT OF
DOUGHERTY COUNTY,
STATE OF GEORGIA**

STATE OF GEORGIA,
Plaintiff
v.
BILLY JENKINS,
Defendant

Case Number 24,883
Distributing Obscene
material
March Term, 1972

TRANSCRIPT

HEARD BEFORE HIS HONOR,
ASA D. KELLEY, JR., JUDGE,
DOUGHERTY JUDICIAL CIRCUIT, PRESIDING,
AND A JURY.
March 22, 23, 1972

APPEARANCES:

FOR THE STATE:
HONORABLE ROBERT W. REYNOLDS,
Attorney at Law, District
Attorney of the Dougherty
Judicial Circuit, Albany, Georgia.

FOR THE DEFENDANT:
HONORABLE PETER ZACK GEER,
and HONORABLE CHARLES F. HATCHER,
Attorneys at Law, of the law firm of Smith,
Gardner Wiggins, Geer and Brimberry,
Albany, Georgia.

BOBBY G. BRINSON, Official
Court Reporter of the Dougherty
Judicial Circuit, Albany, Georgia.

* * *

[R. 5., 4-7]

Thereupon,

LYNN STOUT,

a witness produced on behalf of the State, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. REYNOLDS:

Q. You are Lynn Stout?
A. That's correct.
Q. Where are you employed, Mr. Stout?
A. Investigator with the Dougherty County Sheriff's Department.
Q. And since July of '71, have you had occasion from time to time to go to the Broad Avenue Cinema?
A. Yes, sir, I have.
Q. What county is that in?
A. Dougherty County.
Q. And do you know Billy Jenkins?
A. Yes, sir, I do.
Q. Have you seen him over there often?
A. Yes, sir; most every time that I went either going into the theater or upon leaving, I saw him in the lobby.
Q. Did you have occasion to talk to him since last July?
A. Yes, sir, I have talked to him on several occasions.
Q. Do you know what his duty is over there at the Broad Avenue Cinema, in what capacity he is?
A. He is running the theater. I think his formal title would be Manager.
Q. On January the 13th, did you have occasion to go there?
A. Yes, sir, I did.

Q. At that time did you seize some movie film?
A. Yes, I did; I seized with a search warrant the movie entitled Carnal Knowledge.
Q. Do you have that film now?
A. Yes, sir, it's in my office.
Q. Had that film been playing there on that day?
A. Yes, sir, it had.
Q. At the time that you went over there on the 13th of January, was Mr. Billy Jenkins there?
A. Yes, he was.
Q. Did you show him your papers?
A. Yes, sir, I did.
Q. After then is when you obtained the film?
A. Excuse me?
Q. After you showed him the paper, you obtained the film?
A. Yes, sir, we went upstairs and the film was rewound and we seized it with a search warrant and a copy of the search warrant was given to Mr. Jenkins.

MR. REYNOLDS: He's with you.

CROSS EXAMINATION

BY MR. GEER:

Q. Mr. Stout, how many people were there when you went to serve the search warrant?
A. You're speaking on the 13th?
Q. Yes, sir.
A. I would have to give an estimate because I didn't see the entire crowd.
Q. Give your best judgment?
A. A hundred and twenty-five or a hundred and fifty, something like that.

Q. All right. Now, Mr. Jenkins has never told you that he was the Manager of that theater, has he?
A. Not in those words he hasn't. I have been in the office and observed him making communications and calling and etcetera and I would assume that he runs the theater.
Q. How do you know that?
A. Well, he's the man that I served the warrant on. He's the man that gave all the orders to rewind the film and to have the people leave the theater and etcetera; he was in charge at the time that I made the seizure.
Q. Now, Mr. Stout, how many times did you seize Carnal Knowledge in Albany, Georgia?
A. Three or four times.
Q. Where was it first? Where was the first movie house that you seized Carnal Knowledge, Martin Twin?
A. No, sir.
Q. Where was it?
A. Broad Avenue Cinema.
Q. Do you have knowledge of the movie having been seized at Martin Twin?
A. Yes, sir, I drew the search warrant up; I didn't make the seizure.
Q. But you know that it was seized there?
A. Yes, sir, I do.
Q. What is your official title?
A. Chief Investigator for the Sheriff's Office.
Q. Now, you have viewed Carnal Knowledge prior to the seizure, had you not?
A. Prior to the seizure where?
Q. Well, at the Martin Twin?
A. Yes, sir.

Q. And, of course, you viewed it yesterday, didn't you?
A. Yes, sir, and I viewed it on the 14th when the Grand Jury saw it.
Q. And then again you viewed it yesterday?
A. Day before yesterday.
Q. Day before yesterday?
A. Yes, sir.
Q. Now, of course, in seizing the film, you were doing so under what you considered to be your duty, did you not?
A. Yes, sir.
Q. As a law enforcement officer?
A. Yes, sir.

* * *

[R. 5, 11-16]

Q. All right, assuming that there is a movie playing currently that showed last night and showed again today in Dougherty County, Georgia, at Martin Twin Theater Number I entitled "Such Good Friends", assuming that in the first reel of this movie there is a nude scene of a man with either a book or a card draped over his sex organ and further assume in the first reel that language of "God damn" is used and the language "Horny" is used; assume in the second reel of this movie there is a simulated love making scene of sexual intercourse; assuming that language is used "Son of a bitch" and language used "Bastard" and language used "Sorry we didn't screw more" and assuming that in the third reel there is an insinuation of lesbianism as one woman asks another woman "Is he as good in bed as I am?" And assuming further that in the third reel there is language used "Screw-

ing" and then assuming that in the third reel there is language used "You prick, let's fuck our way to mental health" or "How do you beat the shit out of a man who has screwed your wife"; answer "You don't, you beat the shit out of her" and then in the fifth reel, there is a complete frontal nude scene of a woman with her breasts showing and her pubic hair visible and further assume that in the fifth reel there is a simulated love making scene in which the man cannot get an erection and there is conversation about him not being able to get up an erection and then let's assume that in the fifth reel that there is a scene of a woman who undresses a man while he is standing talking over the telephone and performed an act of sodomy upon him, that is by unnaturally placing the penis in her mouth and further assume that he hangs up the phone and as he reaches a climax and has an ejaculation, he offers the following dialogue as an apology to the woman as his organ comes out of her mouth and said, "Oh my God, I got it on your nose."

Assuming that you have viewed a movie like that, would you swear out a search warrant for it and have it prosecuted under the Georgia Obscenity Statute?

A. If I observed what you described, yes sir.

Q. Well, would you go out this afternoon and view this movie and take that action?

A. I'll probably still be in Court here.

Q. Well, if you are excused as far as the Defendant is concerned, will you do that this afternoon?

A. I will. It will have to be discussed with the District Attorney because he is going to be the prosecutor in the case as I did on this case and all the other

cases that I have investigated during the months of July and August. This was our procedure in all the cases that I investigated and — in July and August, some 42 or 43 films and every one of them was discussed with the District Attorney before any action was taken.

Q. Mr. Stout, don't you often swear warrants out in criminal cases without discussing it with the District Attorney?

A. Not in movies.

Q. But in the crimes, in crimes, don't you swear criminal warrants out without discussing it with the District Attorney?

A. Yes, sir.

Q. Why would you have to discuss this one with the District Attorney?

A. It's the general practice. I have never been involved in movies before these in this period of movie investigation so to speak. I discuss each movie with the District Attorney before I take any action.

Q. All right, but that is not a matter of law, that is a matter of practice?

A. Yes, sir, that's correct.

Q. So, under the law, you could go out this afternoon and view this movie if you are free and you could swear out a warrant? You could swear out a search warrant on your own without asking anybody about it, couldn't you?

A. Yes, sir, I imagine so.

Q. So, if you get free, will you do that?

A. I will talk to the District Attorney about it.

Q. Well, do you talk with him before the other crimes, before they are prosecuted and before you prosecute them?

A. Most of them.

Q. You mean that you don't swear out a warrant without consulting with the District Attorney?
A. The District Attorney is the man who is going to prosecute the case and I want to handle the case the way that he wants to prosecute it.
Q. I understand that, Mr. Stout; I didn't —
A. That's the reason I discuss the case with him and give him an opportunity to answer, Mr. Geer.
Q. The question is do you not generally swear out criminal warrants without asking the District Attorney in other areas other than movie film?
A. Criminal warrants, yes, sir; are you speaking of search warrants or criminal warrants?
Q. Don't you swear out search warrants in other areas other than movies without talking with the District Attorney?
A. In some cases, yes.
Q. You do it often, don't you?
A. We don't actually swear out that many search warrants.
Q. But you don't have to go to ask the District Attorney's permission to swear one out?
A. No, I don't have to.
Q. You are familiar with the procedure in the Sheriff's Office that a Deputy Sherif doesn't have to run around and ask the D. A. whether they can swear out a warrant, do they?
A. Mr. Parrish and I handle 95 percent of the search warrants.
Q. You do it without asking permission from the District Attorney?
A. On some occasions, yes.
Q. On any occasion other than dealing with films?
A. It would depend on — it depends on the case when

we discuss it. We discuss cases a lot of times and we discuss the case with the D. A. and ask his recommendations. He is the man that has to try the case.

Q. But your answer is if these things laid out before you as things being in the film "Such Good Friends" and that if you saw it, you would go and swear out a warrant?

A. If I was sent out to view the film in my official capacity and it was there as you described that it was there as you described it in the letter you have that you read from, yes, I would.

Q. Well, suppose you hear some testimony under oath in this case that this is, in fact, the truth; what will you do?

A. I will have to be sent out.

Q. By whom?

A. By my boss, the Sheriff.

Q. Well, you first said the D. A.

A. Well, I'm directly responsible to the Sheriff.

Q. That's what I thought.

A. That's right.

Q. You are not saying that Mr. Reynolds, he doesn't hire you or fire you, does he?

A. No, sir.

Q. You work with him in connection with law enforcement, but you work for the Sheriff, do you not?

A. That's correct.

Q. Now, would you have to get Mr. Reynold's permission to go out here and seize this film that is now showing if, in fact, you went and viewed it and found these things? Would you have to get his consent?

A. Mr. Geer, if I were sent out there, I would be sent out by the Sheriff. The results of what I saw out

there would be discussed with Mr. Reynolds before I obtained a search warrant.

Q. The Sheriff would only send you out at the District Attorney's recommendations, is that correct?

A. I don't know about that.

Q. He hasn't sent you anywhere else for a film without the District Attorney recommending it, has he?

A. The Sheriff, that's correct.

Q. He has not, has he?

A. Not to my knowledge, no, sir.

Q. You were sent — you were sent by the Sheriff

* * *

[R. 5, 47-49]

Thereupon,

BILLY JENKINS,

the Defendant herein, was called and made the following unsworn statement:

THE COURT: Mr. Defendant, you have a right to make to the Court and to the Jury such statement as you deem proper in your defense. You may relate to the members of the Jury anything that you want to that might be helpful in your defense; go ahead.

THE DEFENDANT: Gentlemen of the Jury, I am Billy Jenkins and I have been in the theater management business for 10 years. I came to Albany, Georgia in February of 1966 as the City Manager of Martin Theaters in charge of their operation in Albany. In the ten year period, I have played all types of movies and have seen many

changes in the audience appeal as well as production changes to satisfy these changes in the audience's appeal.

As far as the motion picture, Carnal Knowledge is concerned, I have no knowledge of this motion picture being obscene or breaking any state or local law because of its content. The picture was critically acclaimed as one of the ten best pictures of 1971 and Ann Margret has received an Academy Award nomination for her performance in the picture.

Carnal Knowledge played in 29 towns in the State of Georgia and is now booked into 50 or 60 more theaters for spring and summer showing.

Included in these showings are Camilla, Georgia, which has the picture booked for March the 31st and Camilla is only 30 miles from Albany. A few of the 29 cities and towns where Carnal Knowledge has played without incident are Cordele, Valdosta, Douglas, Fitzgerald, Macon, Savannah, Milledgeville, Augusta, Dalton, Gainesville, Carlton, Rome and is in Atlanta now showing for the second time.

So, Gentlemen of the Jury, as I have said earlier, I have no knowledge of the motion picture, Carnal Knowledge, being obscene or violating any state or local laws.

Also, I would like to bring out one more thing in reference to Carnal Knowledge. We are not suggesting this movie should be shown to the children. We put — there is an R rating on the picture and we have not and don't intend to admit

anyone under the age of 18 in the theater; 18 year old and older will be the only ones that can see the picture.

MR. GEER: You may come down.

THE COURT: Is there anything further from the Defendant?

MR. GEER: May we have just a second, Your Honor? We rest, Your Honor.

THE COURT: Is there anything further from the State?

* * *

[R. 5, 61-77]

IN THE SUPERIOR COURT OF DOUGHERTY COUNTY, STATE OF GEORGIA

STATE OF GEORGIA, *Plaintiff* v. BILLY JENKINS, *Defendant*	Case Number 24,883 Distributing Obscene Material March Term, 1972

CHARGE OF THE COURT

Gentlemen of the Jury, an accusation has been returned accusing this Defendant of the offense of distributing obscene material. You will have the accusation out with you. It is not evidence, but you may refer to the accusation if you care to do so containing as it does the contentions of the State. All of these contentions, however, are denied by the Defendant.

The fact that the Defendant has been accused raises no presumption or inference whatsoever against him. You will not take the fact that an accusation has been returned against the Defendant as having any probative or evidentiary force or value whatever. The accusation is only the process which the law has adopted to bring the Defendant to trial, containing as it does the contentions of the State. All these contentions are denied by the Defendant.

The Defendant's plea of not guilty challenges and denies every material allegation in the accusation and, I charge you, before the State is entitled to a verdict

of conviction of the Defendant at your hands, the burden is upon the State of proving the Defendant's guilt, as charged, beyond a reasonable doubt.

The defendant enters upon his trial with the presumption of innocence in his favor and this presumption remains with him throughout the trial unless and until it is overcome by evidence sufficiently strong to satisfy you of his guilt to a reasonable and moral certainty and beyond a reasonable doubt. Unless you find such evidence in this case, you would acquit the Defendant.

A reasonable doubt is just what the term implies. It is a doubt based upon reason. It is not a fancy or conjecture or supposition that the Defendant might be innocent; it is just such a doubt as a reasonable man would have, act upon or decline to act upon in a matter of importance or of grave concern to himself. In other words, it is the doubt of a fair minded, impartial Juror honestly seeking for the truth, and it may arise from a consideration of the evidence or from a lack of the evidence or from a conflict of the evidence or from the statement of the Defendant.

If, upon a consideration of all the facts and circumstances of this case, your mind is wavering, unsettled, not satisfied, then that is the reasonable doubt under the law and if such a doubt rests upon your mind, it is your duty to give the Defendant the benefit of that doubt and acquit him. If, on the other hand, no such doubt rests upon your mind, it would be equally your duty to return a verdict of guilty.

You are the sole and exclusive judges of the facts

in the case. You pass upon the weight, force and credit to be given to the evidence in the case and you alone determine the credibility of the witnesses who have testified in the case.

In passing upon the credibility of the witnesses, you are authorized to consider all the facts and circumstances of the case, the witnesses' manner on the stand, their means and opportunity for knowing the matters about which they testified; their interest or want of interest in the case; their intelligence or lack of intelligence; the nature of the matters to which they testified; the probability or improbability of their testimony; their bias or prejudice, if any, and also their personal credibility as the same may legitimately appear from the trial. You may also consider the witnesses' relation to the case or to the parties in the case. All these things are proper subject matters for your consideration insofar as they may legitimately appear from the trial of the case. It is for you to finally determine what credit is to be given a witness.

If there are conflicts in the case, it is your duty to reconcile those conflicts, if you can, so as not to impute perjury to any witness sworn, but if there are conflicts which you cannot reconcile, you should then believe that witness or those witnesses whom you think most entitled to credit.

The Defendant in this case has made a statement. In all criminal trials in this State, the Defendant shall have the right to make to the Court and Jury such statement in the case as he may deem proper in his defense. It shall not be under oath and shall have such force only as the Jury sees fit to give it. You may be-

lieve it in preference to the sworn testimony in the case, if you see proper to so do. You may believe it entirely as true; you may reject it entirely as false; you may believe it in part as true and you may reject it in part as false. The force, weight and credit to be given to the Defendant's statement is a matter entirely for you to determine.

There are two types of evidence. Direct evidence is that which immediately points to the question at issue. Indirect or circumstantial evidence is that which only tends to establish the issue by proof of various facts, sustaining by their consistency the hypothesis claimed.

To warrant a conviction on circumstantial evidence, the proved facts must not only be consistent with the hypothesis of guilt, but they must exclude every other reasonable hypothesis save that of the guilt of the accused. I charge you, however, that whether dependent upon direct or circumstantial evidence, the true test in all criminal cases is not whether the conclusion at which the evidence points may be false, but whether or not the evidence is sufficiently strong to satisfy your minds and consciences as to a reasonable and moral certainty and beyond a reasonable doubt of the Defendant's guilt. If the evidence is thus strong, it would be your duty to convict. If the evidence is not thus strong, it would be equally your duty to acquit.

The witness may be impeached by disproving the facts testified to by that witness. When a witness shall be successfully contradicted as to a material matter, his credit as to other matters shall be for the Jury to determine, but if a witness shall swear will-

fully and knowingly falsely, his testimony shall be discarded entirely unless corroborated by circumstances or other unimpeached evidence.

A person commits the offense of distributing obscene material when he sells, lends, rents, leases, gives, advertises, publishes, exhibits or otherwise disseminates to any person any obscene material of any description, knowing the obscene nature thereof, or who offers to do so, or who possesses such material with the intent to so do provided that the word knowing is used herein shall be deemed to be either actual or constructive knowledge of the obscene content of the subject matter and the person has constructive knowledge of the obscene content if he has knowledge of the fact which would put a reasonable and prudent man on notice as to the suspected nature of the material.

Material is obscene if considered as a whole, applying community standards, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and utterly without redeeming social value and if, in addition, it goes substantially beyond customary limits of candor in describing or representing such matters. Undeveloped photographs, molds, printing plates and the like shall be deemed obscene notwithstanding that processing or other acts may be required to make the obscenity patent or to disseminate it.

Material, not otherwise obscene, may be deemed obscene under this section if the distribution thereof, or the effort to do so, or the possession with the intent to do so is a commercial exploitation of erotica solely for the sake of their prurient appeal.

Every person who, during the course of a play, nightclub act, motion picture, television production or other exhibition or mechanical reproduction of human conduct, engages in conduct which would be public indecency under Section 26-2011 if performed in a public place, shall be guilty of participation in indecent exposure and upon conviction shall be punished as for a misdemeanor.

Every person who procures, counsels or assists any person to engage in such conduct or who knowingly exhibits or procures, counsels or assists in the exhibition of a motion picture, television production or other mechanical reproduction containing such conduct shall be guilty of a misdemeanor.

Now, Code Section 26-2011 provides: A person commits public indecency when he performs any of the following acts in a public place and upon conviction shall be punished as for a misdemeanor:

(a) An act of sexual intercourse;

(b) A lewd exposure of the sexual organs;

(c) A lewd appearance in a state of partial or complete nudity;

(d) A lewd caress or indecent fondling of the body of another person.

The question present with regard to the obscenity of the movie herein is not whether the particular publication depicts sex or sexual activities, but the question is whether the movie can be said to be obscene within the narrow limits as the law has heretofore

defined such limits as to take the movie outside of the protection of the person involved.

Freedom of speech and of the press guaranteed by the Constitution embraces all information and education with respect to the significant issues of the times; embraces all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.

In this case, the State contends that the Defendant is guilty of the offense charged. If you find beyond a reasonable doubt that the Defendant did commit the offense, then you would return a verdict in the following language: "We, the Jury, find the Defendant, Billy Jenkins, guilty."

Now, the Defendant contends that he is not guilty of the offense charged. He further contends that the State has not proved his guilt of any offense charged to a reasonable and moral certainty and beyond a reasonable doubt.

If, upon a consideration of the evidence or from a lack of the evidence or from the evidence of the statement of the Defendant or from the statement of the Defendant alone, you believe these contentions of the Defendant to be the truth of the case, then it would be your duty to find him not guilty, in which event, the form of your verdict would be: "We, the Jury, find the Defendant, Billy Jenkins, not guilty."

Now, you will notice on this accusation that there are two Defendants named. You are concerned here only with the guilt or the innocence of Billy Jenkins

and you will name him in your verdict whether he be guilty or not guilty. Whatever your verdict is, let one of your number write it in the space provided, date it and sign it as Foreman and return it into Court.

(Thereupon, the Jury retired to the Jury Room.)

(Thereupon, hearing recessed.)

(Thereupon, the Jury returned to the Courtroom.)

THE COURT: Mr. Foreman, have you been able to reach a verdict yet?

THE FOREMAN: No sir, we haven't.

THE COURT: Do not tell me how you stand for acquittal or conviction; tell me simply how you stand numerically.

THE FOREMAN: Well, Judge, we have had one vote and I would say that it would be about five and ten and that would not be for sure because some said that they were not committing themselves.

THE COURT: Well, we have this problem. Under the law, you are required to stay together and experience has shown that if you go to a hotel to eat that it will take about an hour and a half or something like that.

I was just wondering because it's going to take some time for some of you to make arrangements to spend the night, I imagine. So, I was just wondering if you would like to deliberate until around 7:30 and then we will arrange for you to be set up over at the hotel and you can make your

arrangements to spend the night and have your meal and resume your deliberations in the morning. Does that sound reasonable to you?

THE FOREMAN: Well, it will take awhile for them to set up at the hotel and suppose we just wait in the Jury Room until they set up at the hotel and we can just use that time to deliberate.

THE COURT: All right, we will do that. If you haven't reached a verdict at that time, then we will just let you make arrangements to spend the night and to get your meal and to resume deliberations in the morning.

THE FOREMAN: Could I ask you this? I think that a dictionary would be of some help if it were available to us.

THE COURT: Ordinarily not. There is no dictionary which has been introduced into evidence and you can resume your deliberations and we will let you know when arrangements are made.

(Thereupon, the Jury retired to the Jury Room.)

(Thereupon, hearing recessed.)

(Thereupon, the Jury returned to the Courtroom.)

THE COURT: Mr. Foreman, are you still unable to make a verdict?

THE FOREMAN: We haven't reached a verdict or close to it.

THE COURT: You are not close to it?

THE FOREMAN: No, sir.

THE COURT: All right, arrangements have been made for whatever you want to have to eat at the hotel and arangements have been made for rooms.

Now, please do not discuss this case with anyone and do not permit anyone to discuss it with you or in your presence. If anyone attempts to do so, you have an obligation to report that fact to the Court.

Now, each of you probably will have a television set. If anything comes on the television relative to this case, please turn it off and don't listen to it or if there is anything on the radio about this case, please don't listen to it. Keep your mind perfectly open as it relates to the evidence and the arguments and the charge and not by what some media has to say about the case.

Now, if you will, be back in the morning after having your breakfast over there and be here in the Courtroom in this box over here at 9:00 o'clock in the morning.

MR. GEER: Your Honor, may we approach the bench?

THE COURT: Yes, sir.

(Thereupon, discussion was held off the record.)

THE COURT: If any of you should want to pick up a magazine, is there a magazine counter over there?

THE BAILIFF: Judge, there may be I don't know.

THE COURT: Is there any objection to them getting a newspaper from out of town? Does anybody have any objection to that?

MR. GEER: Your Honor, I do not.

THE COURT: Do not get the Albany Herald because there is probably some news in there about this case, but any other newspaper you may feel free to go ahead and get and do not discuss this case among yourselves tonight and let's come back in the morning and resume your deliberations and please be back in the box at 9:00 o'clock.

(Thereupon, hearing adourned.)

(EVENTS WHICH OCCURRED ON MARCH the 24th, 1972.)

THE COURT: All right, Gentlemen, if you will, go to your Jury Box and resume your deliberations.

(Thereupon, the Jury retired to the Jury Room.)

(Thereupon, hearing recessed.)

(Thereupon, the Jury returned to the Courtroom.)

THE COURT: Mr. Foreman, do you have any communications that you would like to make?

THE FOREMAN: Well, I think that we have just finally reached it, Judge; I don't know if we stayed in there 'til the 4th of July that we would get much further.

THE COURT: Has there been any change?

THE FOREMAN: Yes, sir, it's 11 to 1.

THE COURT: Well, some Jury is going to have to pass on this case.

THE FOREMAN: We have tried very diligently to reach a decision and it just looks like that it is impossible. We will be glad to do whatever you wish us to do.

THE COURT: Well, try it awhile longer and if you then find that you can't do it, we will have to re-evaluate it. At this time, I, would like to reiterate that I am not trying to force a verdict, but unless somebody has some deep abiding conviction that he cannot give up through reason and thinking, a verdict should be made because both the State and the Defendant wants this Jury to pass on this question.

THE FOREMAN: I can't say that it would help any, but if it could be done, if you could, could you read the charge? It might help some; I don't know.

THE COURT: Is there any particular part that you are interested in?

THE FOREMAN: I don't believe that it would be any particular part. We have tried to ascertain the particular question and haven't been able to get one.

THE COURT: I will be glad to do that if you think it would be helpful.

THE FOREMAN: I don't know whether that

would be in order or not; I thought that I would ask it.

THE COURT: Do you have copies of the Code Section that you have requested?

THE FOREMAN: That's correct, sir.

THE COURT: I can give you the whole charge again, but I don't know that that will help because — why don't you go back to your Jury Room and discuss any specific questions that you want to ask about the charge or whatever the law may be and then write out your request and I will see if we can answer it.

THE FOREMAN: All right.

(Thereupon, the Jury retired to the Jury Room.)

(Thereupon, hearing recessed.)

(Thereupon, the Jury returned to the Courtroom.)

THE COURT: Mr. Foreman, have you been able to reach a verdict.

THE FOREMAN: We have, Your Honor.

THE COURT: All right, Mrs. Gable, receive the verdict and publish it, please.

THE CLERK: State versus Bill Jenkins. We, the Jury, find the Defendant guilty, this 23rd day of March, 1972, William M. Dorsey, Foreman.

(Thereupon, the Jury was dismissed.)

THE COURT: You want to conclude this record now or would you like to wait?

MR. GEER: I have no feelings about it.

MR. REYNOLDS: I had just soon complete it now. I would like to make a recommendation to the Court. I would like to ask the Court to impose a fine on the Defendant of $1,000.00 and give him 12 months suspended under the condition that the movie, Carnal Knowledge, not be shown.

MR. GEER: I would like to ask the Court to impose on him a probationary sentence. This is a landmark case and the District Attorney has told the Jury that these Defendants have incurred considerable expense and, of course, there will be an appeal and I would suggest to the Court that the issue here is broader than Billy Jenkins, as the Court is aware, and I ask the Court not to impose a fine.

SENTENCE OF PROBATION
(Felony or State Misdemeanor and First-Offender)

IN THE SUPERIOR COURT
DOUGHERTY COUNTY, GEORGIA

THE STATE OF GEORGIA
vs.
BILLY JENKINS

CASE NO. 24883

OFFENSE: Distributing Obscene Material

MARCH TERM, 1972

(VERDICT) OF GUILTY

WHEREUPON, it is ordered and adjudged by the Court that the said defendant is hereby sentenced confinement for a period of Twelve (12) Months Probation (months) in the State Penal System or such other institution as the Director of the State Board of Corrections may direct, to be computed as provided by law. However, it is further ordered by the Court that the above sentence may be served on probation, provided that said defendant complies with the following general and special condition herein imposed by the Court as a part of this sentence:

(1) Do not violate the criminal laws of any governmental unit.

(2) Avoid injurious and vicious habits — especially alcoholic intoxication and narcotics and other dangerous drugs unless prescribed lawfully.

(3) Avoid persons or places of disreputable or harmful character.

(4) Report to the Probation Supervisor as directed and permit such Supervisor to visit him (her) at home or elsewhere.

(5) Work faithfully at suitable employment insofar as may be possible.

(6) Do not change his (her) present place of abode, move outside the jurisdiction of the Court, or leave the State for any period of time without prior permission of the Probation Supervisor.

(7) Support his (her) legal dependants to the best of his (her) ability.

Other special conditions ordered by the Court are as follows:

It is further ordered by the Court that the defendant pay as specified: *Must pay a fine of $750.00 through the Adult Probation Office.*

IT IS the further order of the Court, and the defendant is hereby advised, that the Court may at any time revoke or modify any conditions of this probation or change the period of probation and may discharge the defendant from probation. The probationer shall be subject to arrest for violation of any condition of probation herein granted. If such probation is revoked, the Court may order the execution of the sentence which was originally imposed or any portion thereof in the manner provided by law after deducting therefrom the amount of time the defendant has served on probation.

This 23rd day of March, 1972 Asa D. Kelley, Jr., Judge Presiding.

Certificate of Service — This is to certify that a true and correct copy of this Sentence of Probation has been delivered in person to the defendant and he has been duly instructed regarding the conditions as set forth above.

This 23rd day of March, 1972, Benny F. Williams, Probation Supervisor.

Copy received and instructions regarding conditions acknowledged.

This 23rd day of March, 1972, Billy Jenkins, Probationer.

THE STATE

Versus

BILLY JENKINS,
Defendant

IN THE SUPERIOR COURT OF DOUGHERTY COUNTY, GEORGIA

ACCUSATION FOR DISTRIBUTING OBSCENE MATERIAL NO. 24883

NOTICE OF APPEAL

Notice is hereby given that BILLY JENKINS, defendant in the above named, numbered and stated case, hereby appeals to the Supreme Court of Georgia, from the verdict of the jury, dated March 23, 1972, finding the defendant guilty, and further appeals from the sentence of the Court signed by Asa D. Kelley, Jr., Judge presiding on the 23rd day of March, 1972, which said sentence was filed in the Office of the Clerk of Dougherty Superior Court on April 13, 1972.

The offense for which defendant was convicted is a misdemeanor, described in said Accusation No. 24883 as the offense of distributing obscene material and is the criminal offense described and prohibited by the Criminal Code of Georgia, Section 26-2105, (a), (b) and Criminal Code of Georgia, Section 26-2011, (a), (b), (c), (d).

The sentence of the Court was twelve months probation and a fine of Seven Hundred Fifty Dollars ($750.00).

Notice is hereby further given that the said BILLY JENKINS defendant in the above named, numbered and stated case, appeals to the Supreme Court of Georgia from the Order and Judgment of the Superior Court of Dougherty County, Georgia, overruling the Demurrer of the defendant on each and every ground thereof, said Order and Judgment having been signed by the Judge of Dougherty Superior Court on the 20th day of March, 1972, and filed in the Office of the Clerk of Dougherty Superior Court on said date.

The Clerk will please omit nothing from the record on appeal.

Transcript of evidence and proceedings will be filed for inclusion in the record on appeal.

Dated this the 21st day of April, 1972.

SMITH, GARDNER, WIGGINS,
GEER & BRIMBERRY

PETER ZACK GEER
OF COUNSEL FOR DEFENDANT

CHARLES F. HATCHER
OF COUNSEL FOR DEFENDANT

THE STATE versus BILLY JENKINS *Defendant*	IN THE SUPERIOR COURT OF DOUGHERTY COUNTY, GEORGIA ACCUSATION FOR DISTRIBUTING OBSCENE MATERIAL NO. 24883

The defendant in the above identified and numbered case having applied to this court, pursuant to Rule 10-F, Rules of the Supreme Court of the State of Georgia, for an order directing the transmission to the Supreme Court of the State of Georgia of the film, Carnal Knowledge, and all physical exhibits introduced in the trial of the case by the defendant, as part of the record in said case on appeal, and the same having been duly considered;

IT IS, THEREFORE, ORDERED that the Clerk of Dougherty Superior Court transmit to the Supreme Court of the State of Georgia the film, "Carnal Knowledge" and all physical exhibits introduced at the trial of the case by the defendant, as part of the record in said case on appeal.

SO ORDERED this the 21st day of November, 1972.

/s/ Asa D. Kelley, Jr.
JUDGE SUPERIOR COURT
DOUGHERTY JUDICIAL
CIRCUIT

Georgia, Dougherty County

Copy of foregoing order served upon Hon. Robert W. Reynolds, District Attorney, by mailing the same to him in a properly addressed envelope with sufficient postage thereon to insure delivery. This 21st day of November, 1972.

PETER ZACK GEER
Counsel for defendant

[Title omitted in Printing]

ENUMERATION OF ERRORS
[IN THE SUPREME COURT OF GEORGIA]

1.

The trial court erred by its order of March 20, 1972, (R-12) in overruling the Demurrer of the defendant, (R-8,9,10), and each and every ground of said Demurrer, namely grounds 1 through 6, inclusive.

2.

The trial court erred by its order of March 20, 1972, in overruling ground 3, Paragraph 3, of defendant's Demurrer, (R-8).

3.

The trial court erred by its order of March 20, 1972, (R-12), by overruling ground 4, Paragraph 4 of defendant's Demurrer (R-9).

4.

The trial court erred by its order of March 20,

1972, (R-12), in overruling ground 5, Paragraph 5, of defendant's Demurrer (R-9).

5.

The trial court erred by its order of March 20, 1972, (R-12), by overruling ground 6, paragraph 6, of defendant's Demurrer (R-9,10).

6.

The trial court erred in failing and refusing to give defendant's request for charge No. 1, (R-14), in that said request for charge was timely, was adjusted to the evidence and the offense laid in the accusation, and the failure to give said request to charge was harmful and prejudicial to defendant in that said request for charge defined community standards as being in the nation as a whole and any less standard applied in the charge is harmful and prejudicial to defendant, and the request for charge.

* * *

[R. 3, 10-13]

36.

The trial court erred in failing and refusing to give defendant's request for charge No. 50, (R-63), in that said request for charge was timely, was adjusted to the evidence, and to the offense laid in the accusation, and refusal to give said request for charge was harmful and prejudicial to the defendant, and said request for charge was demanded by the evidence and the offense laid in the accusation.

37.

The trial court erred in failing and refusing to give defendant's request for charge No. 51, (R-64), in that said request for charge was timely, was adjusted to the evidence, and to the offense laid in the accusation, and refusal to give said request for charge was harmful and prejudicial to the defendant, and said request for charge was demanded by the evidence and the offense laid in the accusation.

38.

The trial court erred in charging the jury, (T-66), the following:

> "Material is obscene if considered as a whole, applying community standards, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and utterly without redeeming social value and if, in addition, it goes substantially beyond customary limits of candor in describing or representing such matters.";

in that said charge applies the test as to obscenity to "community standards" thus leaving the jury with the clear and strong understanding that community standards will be limited to Albany and Dougherty County, Georgia, alone, and removing from the consideration of the jury the test of obscenity as applied to community standards, in the nation as a whole, and the test thus applied by the court in this charge is harmful and prejudicial to the defendant and fails to protect his constitutional rights of freedom of speech and freedom of expression under the First Amendment of the United States Constitution.

39.

The trial court erred in charging the jury, (T-66), the following:

> "Material, not otherwise obscene, may be deemed obscene under this section if the distribution thereof, or the effort to do so, or the possession with the intent to do so is a commercial exploitation of erotica solely for the sake of their purient appeal.";

in that said charge left the jury with a clear and distinct impression that defendant, from the evidence, could be guilty by pandering, and said charge was not authorized by the evidence, was not adjusted to the evidence, and the same is harmful and prejudicial to the defendant.

40.

The trial court erred in charging the jury, (T-67), the following:

> "Now, Code Section 26-2011 provides: A person commits public indecency when he performs any of the following acts in a public place and upon conviction shall be punished as for a misdemeanor:
>
> (a) An act of sexual intercourse;".

in that there was no evidence in the case showing an act of sexual intercourse, (T-32), (R-76), and said charge was not adjusted to the evidence, and was harmful and prejudicial to the defendant.

41.

The trial court erred in charging the jury, (T-67), the following:

"Now, Code Section 26-2011 provides: A person commits public indecency when he performs any of the following acts in a public place and upon conviction shall be punished as for a misdemeanor:

(b) A lewd exposure of the sexual organs;"

in that there was no evidence in the case showing an act of lewd exposure of the sexual organs, (T-32), (R-76), and said charge was not adjusted to the evidence, and was harmful and prejudicial to the defendant.

42.

The trial court erred in charging the jury, ((T-67), the following:

"Now, Code Section 26-2011 provides: A person commits public indecency when he performs any of the following acts in a public place and upon conviction shall be punished as for a misdemeanor:

(c) A lewd appearance in a state of partial or complete nudity;"

in that there was no evidence in the case showing an act of lewd apperance in a state of partial or complete nudity, (T-32), (R-76), and said charge was not adjusted to the evidence, and was harmful and prejudicial to the defendant.

43.

The trial court erred in charging the jury, (T-67), the following:

"Now, Code Section 26-2011 provides: A person commits public indecency when he performs any

of the following acts in a public place and upon conviction shall be punished as for a misdemeanor:

(d) A lewd caress or indecent fondling of the body of another person.";

in that there was no evidence in the case showing an act of a lewd caress or indecent fondling of the body of another person, (T-32), (R-76), and said charge was not adjusted to the evidence, and was harmful and prejudicial to the defendant.

The Supreme Court of Georgia has jurisdiction in this case for the reason that the same involves a conviction under a State Statute that has been challenged by demurrer as being unconstitutional in violation of the United States Constitution (R. 8-10), and is, therefore, a case assigned by the Constitution of Georgia of 1945 to the Supreme Court of Georgia, Article VI, Section II, Paragraph IV, Constitution of the State of Georgia of 1945; (Section 2-3704; Georgia Code Annotated).

WHEREFORE, Appellant prays that the foregoing Enumeration of Errors and each and every ground thereof be considered by this Honorable Court and the errors herein complained of be reversed.

SMITH, GARDNER, WIGGINS,
GEER & BRIMBERRY

By: /s/ Peter Zack Geer
PETER ZACK GEER

By: /s/ Charles F. Hatcher
CHARLES F. HATCHER
Attorneys for Appellant

607 tr 7

IN THE

SUPREME COURT OF GEORGIA

Decided July 2, 1973

27692. JENKINS v. THE STATE

The evidence amply supports the verdict of guilty by the showing of the film Carnal Knowledge in violation of the definition of distributing obscene materials under Georgia statutes.

JORDAN, Justice. Billy Jenkins appeals his conviction and sentence for the offense of distributing obscene materials. The conviction is based on the fact that he exhibited the film Carnal Knowledge in a movie theater in Albany, Georgia.

The threshold question to be decided is whether or not the showing of the film Carnal Knowledge violates Code Ann. Ch. 26-21 prohibiting the distribution of obscene materials. The trial jury, under proper instructions from the court, has found the defendant guilty. After a review of the record and a viewing of the film by this court we affirm.

Code Ann. § 26-2101 (b) provides that "Material is obscene if considered as a whole, applying com-

munity standards, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and utterly without redeeming social value and if, in addition, it goes substantially beyond customary limits of candor in describing or representing such matters." The accusation charges the defandant "with the offense of distributing obscene material." The accusation without expressly referring to Code Ann. § 26-2105 is then cast in the language of the prohibited acts as defined in Code Ann. § 26-2011. The appellant contends that the accusation is defective in that it fails to include the definition of obscene materials as defined in Code Ann. § 26-2101(b). This view is adopted by the minority which seizes upon this alleged defect to hold Code Ann. § 26-2105 unconstitutional.

It is our view that a statute can provide criminal punishment without the definition of obscenity being included within that specific code section. The chapter in which Code Ann. § 26-2105 is included at its very beginning amply defines obscenity and this particular Code section, which is merely a part of the chapter, must be read in accordance with the entire chapter. This court has held that sections of the code which relate to the same subject matter shall be construed together. See *Touchton v. Echols County*, 211 Ga. 85, 87 (84 SE2d 81). It seems clear then that the definition of obscenity as set forth in the chapter applies to all of the code sections dealing with this same question.

The trial court correctly charged this definition of obscenity as the guideline for the jury to apply in this particular case. In *Roth v. United States*, 354

U.S. 476, it was held that "obscenity is not within the area of constitutionally protected speech or press." *Memoirs v. Mass.*, 383 U.S. 413, gave a test of obscenity to the effect that it must be established that the dominant theme appeals to prurient interest, the material affronts contemporary community standards, and is utterly without redeeming social value. This test has been included in our law (Code Ann. § 26-2101(b)) thus making our present statute considerably more restrictive than the new test set forth in the recent case of *Miller v. California*, No. 70-73, 41 LW 4925. The *Miller* case, supra, further held that juries can consider State or local community standards in lieu of "national standards," thereby bringing the holding of this court in *Gornto v. State*, 227 Ga. 46 (178 SE2d 894) in line with *Miller*, supra, on this point.

This court has held that the exhibition of an obscene motion picture is a crime involving the welfare of the public at large, since it is contrary to the standards of decency and propriety of the community as a whole. *Evans Theatre Corporation v. Slaton*, 227 Ga. 377 (180 SE2d 712). In *Slaton v. Paris Adult Theater, I*, 228 Ga. 343 (185 SE2d 768) that court held that the films involved in that case were "hard core" pornography and that the commercial exhibition of such pictures is not protected by the first amendment. The Supreme Court of the United States which in effect affirmed the *Paris* case, supra, held that States have a legitimate interest in regulating commerce in obscene material and its exhibition in places of public accommodation, including "adult" theaters; further holding that the exhibition of obscene material in such places of public accommoda-

tion is not protected by any constitutional doctrine of privacy, and that a commercial theater cannot be equated with a private home. See *Paris Adult Theater v. Slaton*, No. 71-1051, 41 LW 4935.

We hold that the evidence in this record amply supports the verdict of guilty by the showing of the film Carnal Knowledge in violation of the definition of distributing obscene materials under our Georgia Statutes.

Judgment affirmed. All the Justices concur, except Undercofler, Hawes, and Gunter, JJ., who dissent.

In the Supreme Court of Georgia

27692. JENKINS v. THE STATE (607)

GUNTER, Justice (dissenting). The majority has today affirmed the criminal conviction of the appellant for showing the motion picture "Carnal Knowledge" to a theatre audience in Dougherty County, Georgia. The majority has held that the exhibition of this film in this "local community" is not entitled to the protection of the First Amendment as applied to Georgia and this "local community" by the Fourteenth Amendment. I am in disagreement with the majority, and I respectfully dissent. Having viewed this film with the other members of the Court, I must say, quite subjectively of course, that it is inconceivable to me that this work can be relegated to that area of verbal, written, and performing expression which falls outside of the protection of the First Amendment to the Constitution of the United States. Today's majority decision has drastically narrowed the concept of the First Amendment as applied to the performing arts in Georgia and "local communities" in Georgia.

I am in disagreement with my brothers of the majority for several reasons, and I shall attempt to set them forth in this dissent.

I.

The decision of the Supreme Court of the United States in *MILLER v. CALIFORNIA*, 41 LW 4925, (decided June 21, 1973), inaugurated a new era in the continuing constitutional contest between obscenity-pornography and the First Amendment. As the

MILLER decision said, the history of the Supreme Court's obscenity decisions has been "somewhat tortured". 41 LW at 4926. I would go one step further and say that the Supreme Court's decisions in this area, handed down during the recent and relatively short period of the First Amendment's entire history, have made it impossible for a dealer in such material to make a determination, with any degree of certainty, as to whether the material falls within the protection of the First Amendment or falls outside of its protection.

MILLER gave a new definition of pornographic, unprotected material; *MILLER* laid down basic guidelines for the trior of fact to use in determining what is protected material from what is unprotected material; *MILLER* changed the yardstick for measuring obscene material from "national standards" to "contemporary community standards"; and *MILLER* reiterated that if the application of its definitions, guidelines, and standards do not sufficiently protect First Amendment rights in any case, then First Amendment values are "adequately protected by the ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary".

In the case at bar the film "Carnal Knowledge" was shown by the appellant to a theatre audience in Doughtery County, Georgia; a warrant and accusation were issued against the appellant charging him with having committed a crime by showing the film; and the appellant's' trial and conviction by a jury followed. All of this took place in the first four months of 1972, long before the changing of definitions, guide-

lines, and yardsticks of measurement by the *MILLER* decision rendered June 21, 1973. Yet the *MILLER* criteria have been applied by the majority in this case in affirming the appellant's conviction. That cannot be done, and for the majority to have done it in this case is, in my view, a denial of due process of law to the appellant.

In 1972 the appellant had every legal right to believe that the yardstick that he was to use in distinguishing unprotected from protected material was "national standards". The Supreme Court's opinion in *JACOBELLIS v. OHIO*, 378 US 184, (1964), now relegated by *MILLER* to a mere plurality decision, said: "We thus reaffirm the position taken in *ROTH* to the effect that the constitutional status of any allegedly obscene work must be determined on the basis of a national standard." Six Justices made up the *JACOBELLIS* majority, and not one of them gave the slightest indication that a national standard was not the yardstick to be applied.

Understandably then, appellate court judges or persons dealing in material that might be unprotected legitimately used a national standard yardstick to determine for themselves whether the material was protected or not. In the case of *FELDSCHNEIDER v. THE STATE*, 127 Ga. App. 745, (1972), the Court of Appeals of Georgia said at page 749: "The trial court erred in limiting the meaning of contemporary community standards to 'the local community — to your community.' If we were allowed to apply and be guided by the recent *GORNTO* case by the Supreme Court of our own state, the trial court's charge would have been correct; but we are controlled by the three re-

cent decisions of the United States Supreme Court, to wit, *JACOBELLIS, MANUEL ENTERPRISES* and *ROTH*, supra, and consequently, we hold that the trial court's charge in these two instances constituted reversible error." To the same effect is the decision in *FISHMAN v. STATE*, 128 Ga. App. 505, (1973), where a 7-2 majority of our Court of Appeals said on page 508: "The community standards to be applied are those of the national, not the immediate local community."

In January, 1972, when the motion picture "Carnal Knowledge" was exhibited by the appellant, the film had shown in the major cities of the nation, the major cities in Georgia, and in many of the cities and towns in Georgia without any contention being publicly made that it was obscene-pornographic.

"Carnal Knowledge" was reviewed in July, 1971, in the *Saturday Review*, the *Washington-Post*, the *New York Daily News*, *Time*, the *Atlanta Constitution*, and the *Atlanta Journal*. None of these reviews gave the slightest indication that the film was obscene-pornographic. Terry Kay, *Atlanta Journal* amusements editor, concluded the review in that Georgia paper as follows: "In the end there is no real triumph for the characters. Different attitudes, perhaps, but no triumph.

"The effect is with the viewer, who — like it or not — has been stung to the quick by a prodding of human values.

"So what does 'Carnal Knowledge' tell us? Simply that we are victims, or subjects to be victimized, by

the very life-system we create for ourselves.

" 'Carnal Knowledge' says it with sex. It is theatrical that way — sex being the denominator common to everyone. But it could be said about any facet of our lives.

"It is a movie that will be controversial in the heaviest sense of the word, but it is still one of the best that we have had in a long time."

In *MILLER* the Chief Justice of the United States said: ". . . a 'national standard' of First Amendment protection enumerated by a plurality of this Court, was correctly regarded at the time of the trial as limiting State prosecution under the controlling case law." However, the Chief Justice then went on to say that since the appellant in that case did not raise the "national standard" issue at the trial but only on appeal, the trial court's charge to the jury that it consider state community standards was not a constitutional error.

To me, this retroactive application of the *MILLER* yardstick as opposed to the *JACOBELLIS* yardstick has the effect of saying that a theatre operator could rely on *JACOBELLIS* in January, 1972, in deciding whether to exhibit a film, but in April, 1972, when he was tried before a jury for exhibiting the film, it was all right for the Court and jury to completely ignore the standard established by *JACOBELLIS* and apply a different standard which had not at the time of the trial been enunciated and which would not be established by the Supreme Court of the United States until June 21, 1973.

I should add that in the present case the "national standard" issue was raised by the appellant in both the trial court and the appellate court.

The majority here today has retroactively applied the *MILLER* "contemporary community standards" yardstick in affirming a criminal conviction, thereby depriving appellant of his legal right in January, 1972, to have applied a "national standard" yardstick in making his decision that the film "Carnal Knowledge" came within the protection of the First Amendment.

If, between the time of *JACOBELLIS* and the time of *MILLER*, the Justices of the Supreme Court of the United States did not know what yardstick to apply, and then changed rather dramatically from one to the other, how can a theatre manager in Georgia be faulted, much less criminally convicted, for having made a decision in 1972 based on the *JACOBELLIS* national standard?

The retroactive application of *MILLER* in this manner in this case by the majority has, in my opinion, deprived appellant of due process of law under both the Georgia and Federal Constitutions.

II.

Assuming that what I have said heretofore, to the effect that the retroactive application of local community standards in this case is constitutionally impermissible, is incorrect, and the majority today holds that I am wrong on this point, then the film "Carnal Knowledge" is, in my judgment, entitled to the protection of the First Amendment even after applying local contemporary community standards.

MILLER, as noted earlier, reasserts that First Amendment values "are adequately protected by the ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary."

The so-called plurality opinion in *JACOBELLIS* said: "Hence we reaffirm the principle that, in 'obscenity' cases as in all others involving rights derived from the First Amendment guarantees of free expression, this Court cannot avoid making an independent constitutional judgment on the facts of the case as to whether the material involved is constitutionally protected. . . . We would reiterate . . . that 'the portrayal of sex, e.g. in art, literature and scientific works, it not itself sufficient reason to deny material the constitutional protection of freedom of speech and press.' . . . It follows that material dealing with sex in a manner that advocates ideas, . . . or that has literary or scientific or artistic value or any other form of social importance may not be branded as obscenity and denied the constitutional protection."

As I read the majority opinion in *MILLER*, it approves and reaffirms these enunciations procreated into constitutional law in *JACOBELLIS* by a mere plurality of the Justices.

If there ever has been or will be a case where independent appellate review of the facts as to whether the material involved is constitutionally protected is necessary to protect First Amendment values, then the case at bar is the case.

This Court has conducted an independent review. We have seen the film "Carnal Knowledge".

Four members of this Court deem it to be obscene, pornographic, unprotected material. Three members of this Court, including the writer, would hold it to be constitutionally protected material.

In Division Four of the *MILLER* opinion the Chief Justice said: "The dissenting Justices sound the alarm of repression. . . . These doleful anticipations assume that Courts cannot distinguish commerce in ideas, protected by the First Amendment, from commercial exploitation of obscene material."

My experience with this one case teaches me that the "alarm of repression" was validly sounded; it also teaches me that the *MILLER* majority's assumption, that Courts can distinguish commerce in ideas that is protected from commercial exploitation of obscene material that is not protected, is a too optimistic assumption. The instant case is the proof that is in the pudding; material is pornographic and unprotected in the subjective mind and senses of one judge; and that same material has serious literary or artistic value in the subjective mind and senses of another judge; all of which leads me to repeat that often-stated assertion by lawyers: a majority of the Justices of the Supreme Court of the United States is not final because the members of that majority are infallible, — that majority is infallible only because it is final.

If the motion picture "Carnal Knowledge" is not entitled to judicial protection under the First Amendment's umbrella, then future productions in this art form utilizing a sexual theme are destined to be obscenely soaked in the pornographic storm.

III.

The appellant's conviction should not be affirmed because he was not legally accused of having committed a crime.

A warrant was issued for the appellant for having violated Ga. Code § 26-2105. This Code Section was enacted by the Georgia legislature in 1971, and this case is the first time that this Court has given consideration to it.

This statute, as relevant in this case, provides as follows:

> "(a) Every person who, during the course of a . . . motion picture, engages in conduct which would be public indecency under § 26-2011 if performed in a public place, shall be guilty of participation in indecent exposure and upon conviction shall be punished as for a misdemeanor.
>
> "(b) Every person who . . . knowingly exhibits . . . a motion picture . . . containing such conduct shall be guilty of a misdemeanor."

Georgia Code § 26-2011, our public indecency statute referred to in Code § 26-2105, is as follows:

> "A person commits public indecency when he performs any of the following acts in a public place and upon conviction shall be punished as for a misdemeanor: (a) An act of sexual intercourse; (b) a lewd exposure of the sexual organs; (c) a lewd appearance in a state of partial or complete nudity; (d) a lewd caress or indecent fondling of the body of another person."

It is thus seen that the conduct referred to in Code § 26-2105 is "public indecency" or "indecent exposure. Code § 26-2105 does not make reference in any manner whatsoever to "obscene materials".

Prior to arraignment and trial the appellant attacked and moved to dismiss the Accusation that was preferred against him based on the warrant. His contention was that the warrant and the Accusation were based on the 1971 Georgia statute (Code § 26-2105), and that the 1971 Georgia statute was unconstitutional. The trial judge overruled these constitutional attacks.

In my opinion the 1971 Georgia statute is patently unconstitutional. This statute attempts to transfer the crime of public indecency into the motion picure art form. This cannot be done if the First Amendment means anything at all, and if a motion picture is a work or material that enjoys protection under the First Amendment. Conduct performed in person and in public, such as indecent exposure, is not protected by the First Amendment. Conduct portrayed in the motion picture art form is protected by he First Amendment unless the portrayal, considered in the entire context of the motion picture, lacks "serious literary, artistic, political, or scientific value" (*MILLER v. CALIFORNIA* standard) or is "utterly without redeeming social value" (pre-*MILLER v. CALIFORNIA* standard).

In other words, a single or even several acts of public indecency portrayed in a motion picture or described by the written word in a novel cannot be defined as a crime because of the protection given to

motion pictures and novels as forms of expression by the First Amendment. The entire motion picture or the novel must be considered as a whole in determining whether the work is pornographic, thus falling outside of the protection of the First Amendment.

The *MILLER* opinion says: "State statutes designed to regulate obscene materials must be carefully limited. See *INTERSTATE CIRCUIT, INC. v DALLAS*, supra 390 US, at 682-685 (1968)."

The 1971 Georgia statute is not "carefully limited". It says that an actor who portrays one or more acts of indecent exposure in a motion picture is guilty of having committed a crime. It further says that one who exhibits a motion picture containing such a portrayal is guilty of a crime.

I think that this 1971 Georgia statute is directly violative of the First Amendment, and I further think that it violates the Fourteenth Amendment in that it is overly broad.

The warrant in this case, and the Accusation based on the warrant, charged the appellant only with having violated Code § 26-2105. In my view this statute is unconstitutional. A criminal charge cannot be founded on a void statute. Therefore the Accusation charged no crime at all, and it should have been dismissed by the trial judge when properly attacked in the trial court.

It follows that I would reverse this criminal conviction.

I respectfully dissent.

In the Supreme Court of Georgia

27692 JENKINS v. THE STATE (607)

HAWES, Justice, dissenting. I join in the dissenting opinion of Mr. Justice Gunter, a classic of legal reasoning and First Amendment wisdom, and I would add nothing to what has been said were it not for my concern for the grave danger to free speech and expression inherent in the majority opinion and about which I cannot here remain silent.

Two aspects of the opinion of the majority which are of most concern to me are the following: (1) the tacit approval of small towns and hamlets as being the "community" from which the standard for obscenity is drawn; and (2) the determination by four members of this court, upon an independent appellate review, that the film *Carnal Knowledge* is obscene, that is, that it has no artistic or literary value and is "utterly without redeeming social value." To give approval to the first would be to place in the hands of the few the tastes and the cultural advancement of the many who are members of the greater state community and to deny in large measure the basic freedom of individuals to participate as they will in the general commerce of ideas. And to approve of the latter would be to equate realistic commentary on our sexual natures in a social context with that of obscenity, an equivalence surely belied as a matter of constitutional law and as a matter of fact. Certainly, the film under consideration here is not the kind of hard-core pornography we removed from public consumption in *Slaton v. Paris Adult Theater I*, 228 Ga. 343 (185 SE2d 768) (1971).

I add these few remarks only because I believe if the majority opinion is accepted we shall have suffered a serious injury to free speech and free expression in Georgia.

27692

SUPREME COURT OF GEORGIA

ATLANTA, July 2, 1973

The Honorable Supreme Court met pursuant to adjournment.

The following judgment was rendered:

Billy Jenkins v. The State

The case came before this court upon an appeal from the Superior Court of Dougherty County; and, after argument had, it is considered and adjudged that the judgment of the court below be affirmed. All the Justices concur except Undercofler, Hawes & Gunter, JJ., dissent.

BILL OF COSTS, $30.00

SUPREME COURT OF THE STATE OF GEORGIA

CLERK'S OFFICE, ATLANTA, AUG. 14, 1973

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia, and that Smith, Gardner, Wiggins, Geer & Brimberry paid the above bill of costs.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Joline B. Williams, *Clerk*

CERTIFICATE OF SERVICE OMITTED
IN PRINTING

Supreme Court of the United States

No. 73-557

Billy Jenkins,

Appellant,

v.

Georgia

APPEAL from the Supreme Court of the State of Georgia.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

December 10, 1973

FILE COPY

SEP 27 1973

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. 73 557

BILLY JENKINS,
Appellant
v.
STATE OF GEORGIA
Appellee

On Appeal from the Supreme Court of Georgia

JURISDICTIONAL STATEMENT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO.

BILLY JENKINS,
Appellant

v.

STATE OF GEORGIA
Appellee

On Appeal from the Supreme Court of Georgia

JURISDICTIONAL STATEMENT

Appellant, Billy Jenkins, appeals from the judgment of the Supreme Court of Georgia entered on July 2, 1973 (Appendix B, *infra*), affirming (4-3) the judgment of the Superior Court of Dougherty County finding him guilty of exhibiting the film "Carnal Knowledge" in violation of Georgia Code Ann. Ch. 26-21.

OPINIONS BELOW

The three opinions filed in the Supreme Court of Georgia (a majority opinion and two dissenting opinions) are not yet reported. They are reprinted in Appendix A, 1-17, *infra.*

JURISDICTION

This criminal action was instituted by the State of Georgia in the Superior Court of Dougherty County, Georgia, accusing Billy Jenkins of violating Georgia Code Ann. §26-2105. A jury returned a verdict of guilty, which was affirmed by the judgment of the Supreme Court of Georgia, the State's highest court, entered on July 2, 1973. Notice of appeal was filed on September 20, 1973 (App. C). The jurisdiction of this Court rests upon 28 U.S.C. §1257 (2). *See, e.g., Dahnke-Walker Milling Co. v. Bondurant,* 257 U.S. 282 (1921); *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58 (1963); *Freedman v. Maryland,* 380 U.S. 51 (1965); *Cohen v. California,* 403 U.S. 15 (1971); *Miller v. California,* — U.S. — (June 21, 1973).

STATUTES INVOLVED

Georgia Code Ann.

§26-2105 Plays, night club acts, motion pictures, television productions or other exhibitions

(a) Every person who, during the course of a play, night club act, motion picture, television production or other exhibition, or mechanical reproduction of human conduct, engages in conduct which would be public indecency under section 26-2011 if performed

in a public place, shall be guilty of participation in indecent exposure and upon conviction shall be punished as for a misdemeanor.

(b) Every person who procures, counsels or assists any person to engage in such conduct or who knowingly exhibits or procures, counsels or assists in the exhibition of a motion picture, television production of other mechanical reproduction containing such conduct shall be guilty of a misdemeanor.

[Georgia Laws 1971 Session, pp. 344, 345, effective April 1, 1971]

§26-2011 Public Indecency

A person commits public indecency when he performs any of the following acts in a public place and upon conviction shall be punished as for a misdemeanor:

(a) An act of sexual intercourse;

(b) A lewd exposure of the sexual organs;

(c) A lewd appearance in a state of partial or complete nudity;

(d) A lewd caress or indecent fondling of the body of another person.

[Georgia Laws 1968 Session, pp. 1249, 1301; effective July 1, 1969]

§26-2101 Distributing Obscene Materials*

*(b) Material is obscene if considered as a whole,

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* §§26-2101(b) and 26-2101(c) are set forth here for the convenience of the Court. Unlike §§26-2105 and 26-2011, which are expressly involved throughout the proceedings below, §§26-2101(b) and 26-2101(c) are involved only in certain stages of the proceedings.

applying community standards, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and utterly without redeeming social value and if, in addition, it goes substantially beyond customary limits of candor in describing or representing such matters. Undeveloped photographs, molds, printing plates and the like shall be deemed obscene notwithstanding that processing or other acts may be required to make the obscenity patent or to disseminate it.

*(c) Material, not otherwise obscene, may be obscene under this section if the distribution thereof, deemed or the offer to do so, or the possession with the intent to do so is a commercial exploitation of erotica solely for the sake of their prurient appeal.

QUESTIONS PRESENTED

I. Whether Georgia Code Ann. §26-2105 is unconstitutional on its face, as applied, and as construed by the Supreme Court of Georgia.

II. Whether Appellant was denied due process of law in the proceedings below, including those in the Supreme Court of Georgia.

III. Whether it is constitutionally permissible to employ "local," as opposed to statewide, contemporary community standards in evaluating the purient interest, appeal and patent offensiveness of allegedly obscene material.

IV. Whether the film "Carnal Knowledge" is obscene.

STATEMENT

"Carnal Knowledge" is a film which was critically acclaimed as one of the "10 Best" pictures of the year 1971 (App. A, 8-9; R. 5, 48).[1] Actress Ann-Margaret received an Academy Award nomination for her performance (R. 5, 48). The film enjoyed popularity throughout the nation, including many towns in Georgia (R. 5, 48).

Appellant, Billy Jenkins, manager and president of the Broad Avenue Cinema in Albany, Georgia, was exhibiting "Carnal Knowledge" on January 13, 1972, when the Dougherty County Sheriff's Office seized the film pursuant to a search warrant (R. 5, 5). Jenkins was arrested on February 10, 1972 for violation of Georgia Code Ann. §26-2105 (R. 4, 4; App. D), and was accused by a Dougherty County Grand Jury on March 6, 1972 (R. 4, 6; App. E).[2] The accusation employed the general chapter heading for Georgia Code

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[1] As certified by the Clerk of the Supreme Court of Georgia on August 14, 1973, the Record below includes five separate documents, numbered as follows: (1) Opinion of the Supreme Court of Georgia; (2) Remittitur of the Supreme Court of Georgia; (3) Enumeration of Errors filed in the Supreme Court of Georgia; (4) Trial Court Clerk's Record; and (5) Trial Court Reporter's transcript. Accordingly, as employed herein, a record reference such as "R. 5, 48" refers to the Record in the Supreme Court of Georgia, Document No. 5, page 48. A copy of the Record in the Supreme Court of Georgia is on file with the Clerk of this Court.

[2] As handed down by the Grand Jury, the accusation also named a co-defendant, Whitfield Woodall, but the case was subsequently nol prossed as to him (R. 4, 7).

Ch. 26-21 ("distributing obscene material")[3], but specified the charge against Jenkins *only* with selected language from §§26-2105 and 26-2011, stating that he did:

> knowingly exhibit a motion picture to the general public which motion picture contained conduct showing (a) an act of sexual intercourse (b) a lewd exposure of the sexual organs, (c) a lewd appearance in a state of partial or complete nudity, (d) a lewd caress or indecent fondling of another person [R. 4, 6].

Defendant Jenkins demurred to the accusation (R. 4, 8-12). Among the six grounds of the demurrer were challenges to Georgia Code Ann. §26-2105 as being unconstitutional on its face and as applied to him (R. 4, 8-10). The trial judge overruled each and every ground of the demurrer without comment (R. 4, 12).

Jenkins was tried in the Dougherty County Superior Court on March 22 and 23, 1972. The prosecutor introduced as evidence only the film "Carnal Knowledge," which was viewed by the jury, and then rested. Defendant introduced testimony about another film showing in Albany, as well as copies of explicit sexual

---

[3] Although it bears the general heading "Distributing Obscene Materials," Ch. 26-21 comprises separate and distinct provisions dealing with obscenity and pandering (§26-2101); the unsolicited mailing of explicit sexual material (§26-2102); use of premises so as to constitute a public nuisance (§26-2103); obscenity and advertising therefor declared to be contraband (§26-2104); portraying acts which would constitute "public indecency" (§26-2105); and a severability provision (§26-2106).

books and magazines then available for purchase in Albany (R. 5).

The trial judge's instructions to the jury noted that the State's contentions lay in the accusation (R. 5, 61), which recites only selected language from §§2105 and 2011. Nevertheless, the instructions encompassed three separate and distinct statutory provisions: (1) §26-2101(b) (obscenity);[4] (2) §26-2101(c) ("pandering" or intent to pander); and (3) §26-2105 (exhibition of a film portraying acts which would constitute "public indecency") (R. 5, 66-67). On March 23, 1973, the jury returned a general verdict of guilty (R. 5, 76-77). Jenkins was fined $750.00 and sentenced to 12 months' probation (R. 4, 69).

Jenkins appealed the judgment to the Supreme Court of Georgia, arguing that §26-2105 was unconstitutional on its face and as applied to him; that he was denied due process of law; that "local" community standards could not constitutionally be employed; and that the film "Carnal Knowledge" is not obscene in any case (Appellant's Enumeration of Errors in the Supreme Court of Georgia, R. 3).

On June 21, 1973, this Court announced its de-

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[4] In connection with §26-2101(b), the jury was instructed to apply "community standards" to measure the obscenity of the film (R.5,66). It is apparent from the Record that "local" community standards were thus involved, *not* statewide or national standards. *See* Appellant's Enumeration of Errors in the Supreme Court of Georgia (R. 3, 1-3); Brief of Appellant in the Supreme Court of Georgia, page 10; Brief of Appellee in the Supreme Court of Georgia, pages 4-5.

cisions in *Miller v. California*, — U.S. —, and companion cases. On July 2, 1973, the Supreme Court of Georgia affirmed the conviction of Billy Jenkins by a vote of four to three. *Jenkins v. State*, — Ga. —, — S.E. 2d — (1973) (App. A).

The Supreme Court of Georgia characterized the "threshold question" as being "whether or not the showing of the film Carnal Knowledge violates [Georgia] Code Ann. Ch. 26-21 prohibiting the distribution of obscene materials" (App. A, 1). Although Jenkins had been charged only with a violation of §26-2105 and although that provision does not mention the word "obscene," the Supreme Court of Georgia concluded that:

> It is our view that a statute can provide criminal punishment without the definition of obscenity being included within that specific code section. The chapter in which Code Ann. §26-2105 is included at its very beginning amply defines obscenity and this particular Code section, which is merely a part of the chapter, must be read in accordance with the entire chapter . . . It seems clear then that the definition of obscenity as set forth in the chapter applies to all of the code sections dealing with this same question.
>
> The trial court correctly charged this definition of obscenity as the guideline for the jury to apply in this particular case . . . *Memoirs v. Mass.*, 383 U.S. 413, gave a test of obscenity to the effect that it must be established that the dominant theme appeals to prurient interest, the material affronts contemporary community standards, and is utterly without redeeming social value. This test

> has been included in our law (Code Ann. §26-2101(b)) thus making our present statute considerably more restrictive than the new test set forth in the recent case of *Miller v. California*, No. 70-73, 41 LW 4925. The *Miller* case, supra, further held that juries can consider State or local community standards in lieu of 'national standards,' thereby bringing the holding of this court in *Gornto v. State*, 227 Ga. 46 (178 S.E. 2d 894) in line with *Miller*, supra, on this point. [App. A, 2-3.]

On the basis of the above rationale, the Supreme Court of Georgia held that the statute was constitutional as construed by it, and that the trial judge's instructions to the jury were proper.[3]

Having viewed the film, the Court concluded that:

> [t]he evidence in this record amply supports the verdict of guilty by the showing of the film Carnal Knowledge in violation of the definition of distributing obscene materials under our Georgia Statutes. [App. A, 4.]

The dissents expressed surprise and shock that "Carnal Knowledge" could be denied First Amendment protection under *any* constitutional formula (Gunter, J., dissenting, App. A, 5; Hawes, J., dissenting, App. A, 16). According to Justice Gunter, the majority's finding that the film was obscene "teaches

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[3] The Supreme Court of Georgia's opinion does not mention the fact that the trial judge's instructions to the jury included §26-2101(c) as well as §§26-2105, 26-2011 and 26-2101(b).

me that the 'alarm of repression' was validly sounded" by the four Justices of this Court who dissented in *Miller* and its companion cases (App. A, 12).

Both dissents considered the majority's use of *Miller* to be a violation of due process, since Appellant's conviction was upheld under legal standards altogether different from and less exacting than the law that existed at the time of trial (Gunter, J., dissenting, App. A, 5-10; Hawes, J., dissenting, App. A, 16).

Justice Gunter also disagreed with the majority's construction of §26-2105, which he maintained was "patently unconstitutional" and incapable of rehabilitation (Gunter, J., dissenting, App. A, 14).

Justice Undercofler also dissented, but did not file an opinion.

THE QUESTIONS ARE SUBSTANTIAL

I. The constitutionality of the statute on its face, as applied, and as construed by the Supreme Court of Georgia.

(1) **On its face.** Motion pictures are a form of expression protected by the First Amendment. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502 (1952). A particular film may be suppressed completely only if it is found to be obscene. *Paris Adult Theatre I v. Slaton*, — U.S. — (1973);[6] *Jacobellis v. Ohio*, 378 U.S. 184 (1964).

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[6] The *Paris Adult Theatre* case involved the definition of obscenity contained in Georgia Code Ann. §26-2101(b). It did not involve §26-2105.

Georgia Code Ann. §26-2105 imposes an absolute prohibition against exhibition of motion pictures which portray any of the acts enumerated in Georgia Code Ann. §26-2011, the state's "public indecency" law. This *per se* prohibition operates "across the board," *cf. California v. LaRue*, 409 U.S. 109, 118 (1972), totally without regard to whether films portraying such acts are obscene. To the extent that it may be considered an "obscenity" law, §26-2105 makes sex and obscenity synonymous. *Cf. Roth v. United States*, 345 U.S. 476, 487 (1957).

On its face, §26-2105 therefore makes no attempt to "distinguish commerce in ideas, protected by the First Amendment, from commercial exploitation of obscene material." *Miller v. California*, — U.S. —, 21 (1973).[7] Its prohibitions are "appallingly overboard, permitting the suppression of a vast range of literary, scientific, and artistic masterpieces." *Paris Adult Theatre I. v. Slaton, supra* (dissenting opinion of Brennan, J., at 21).

This Court has not previously been confronted with the application of "public indecency" or "indecent exposure" laws, standing by themselves, to motion pictures and other forms of expression, but its prior decisions, *e.g., Cohen v. California*, 403 U.S. 15, 26 (1971), make it clear that they may not be so ap-

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[7] All page references employed herein in connection with this Court's obscenity decisions of June 21, 1973, are to the slip opinions.

plied.[8] Indeed, one court has already held that §26-2011, which enumerates the acts whose portrayal is prohibited by § 26-2105, could not constitutionally be applied to a stage play. *Southeastern Promotions, Ltd. v. City of Atlanta, Ga.*, 334 F. Supp. 634, 643 (N.D. Ga. 1971).[9] And other courts have so held with respect to attempts to so apply similar laws. *See, e.g., P.B.I.C., Inc. v. Byrne*, 313 F. Supp. 757, 765 (D. Mass. 1970) (three-judge court); vacated and remanded to consider mootness, 401 U.S. 987 (1971); affirmed on remand (June 16, 1971); vacated and remanded for reconsideration, — U.S. — (June 25, 1973).

Given this Court's recent holding that obscenity laws must now be limited in application to depictions or descriptions of specifically defined sexual conduct, *Miller v. California, supra*, it is likely that other attempts will be made to apply "indecent exposure"

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[8] Section 26-2105 is clearly aimed at expression, not conduct. *Cf. United States v. O'Brien*, 391 U.S. 367 (1968). Even assuming that Section 26-2105 evidences only a governmental interest in regulating conduct, the resulting restrictions on First Amendment freedoms are clearly intolerable. *Id.* at 376-377. *See Miller v. California, supra* at 11 n. 8: ". . . the States have greater power to regulate nonverbal, physical conduct than to suppress depictions or descriptions of the same behavior." *See also*: *Schacht v. United States*, 398 U.S. 58 (1970).

[9] Although it arose several months after April 1, 1971, the effective date of §26-2105, the *Southeastern Promotions* case involved §26-2011 alone. Since it became effective, §26-2105 has been challenged in one other case, but the issue of its constitutionality was not reached. *Cooley v. Endicator*, 340 F.Supp. 15 (N.D. Ga. 1971), *aff'd* per curiam, 458 F.2d 513 (5th Cir. 1972), *cert. denied*, 409 U.S. 1115 (1973).

laws, either by themselves or in conjunction with other statutory provisions, to motion pictures and other forms of expression. This Court should therefore squarely hold that they may not be so applied consistently with the First Amendment.[10]

(2) **As applied.** Appellant was charged *only* with a violation of §26-2105. Nevertheless, the trial judge's instructions to the jury encompassed the definitions of prohibited offenses contained in §§26-2101(b) (obscenity) and 26-2101(c) ("pandering" or intent to pander), as well as §26-2105 (including §26-2011). (R.5,65-67). Since the Supreme Court of Georgia later held that the trial judge's instructions were proper, (App. A, 1), the constitutionality of each of these provisions is an issue in this case.

If the jury based its general verdict of guilty on §26-2105, Appellant's conviction must be reversed because the statute was clearly void for overbreadth. *See* Point I(1), *supra*.

If the jury based its verdict on the definition of obscene material contained in §26-2101(b), Appel-

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[10] Indeed, even in those areas in which states may have greater regulatory latitude (*e.g.*, "fighting words" or "obtrusive" exhibitions of explicit sexual material to unwilling persons), this Court has already indicated that a *per se* approach is constitutionally unacceptable. *See Rosenfeld v. New Jersey*, 408 U.S. 901 (1972); *Lewis v. City of New Orleans*, 408 U.S. 913 (1972); *Brown v. Oklahoma*, 408 U.S. 914 (1972); *Cason v. City of Columbus*, 409 U.S. 1053 (1972).

lant's conviction must likewise be reversed. This provision is not limited in application to material depicting or describing specifically defined sexual conduct, nor did the trial judge's instructions to the jury so limit it. *See Miller v. California, supra* at 12-13; *Paris Adult Theater I v. Slayton, supra.*

If the jury based its verdict on §26-2101(c), Appellant's conviction must also be reversed. This provision is not only hopelessly vague, *e.g., Coates v. City of Cincinnati*, 402 U.S. 611 (1971); it is also overbroad. While this Court has held that *actual* "pandering" may be relevant to a determination of obscenity in certain limited circumstances, *Ginzburg v. United States*, 383 U.S. 463 (1966), it has never suggested, let alone held, that there may constitutionally be such a crime as possession with intent to pander.

(3) **As construed.** The Supreme Court of Georgia has not yet construed §26-2105 "so as to avoid all constitutional difficulties." *United States v. Thirty-Seven Photographs*, 402 U.S. 363, 369 (1971); *Gooding v. Wilson*, 405 U.S. 518, 528 (1972). Despite the Court's attempt to rehabilitate it in this case, the statute remains subject to two possible interpretations, both of which raise substantial federal questions.

One possible interpretation would be that §26-2105 and §26-2101(b) must be employed together in obscenity prosecutions. This interpretation is possibly supported by the Court's holding that §§26-2105 and 26-2101(b) must be "construed together" and that §26-2105 "must be read in accordance with the entire chapter" in which it appears (App. A, 2).

Under this first possible interpretation, the pur-

portedly rehabilitated statute would still appear to be "susceptible of application to protected expression." *Gooding v. Wilson*, *supra* at 522. While §26-2101(b) is within constitutional boundaries as a *part* of the test of obscenity and may be retained, *Mishkin v. New York*, 383 U.S. 502, 508 (1966), some of the acts enumerated in §26-2011 (which is incorporated into §26-2105) would appear to make the statute overbroad. Certainly, a "lewd appearance in a state of partial or complete nudity" [§26-2011(c)] and a "lewd caress or indecent fondling of the body of another person" [§26-2011(d)] cannot reasonably be considered as "examples" of the type of "hard core sexual conduct" which this Court intended to reach in its decisions of June 21, 1973. *Miller v. California*, *supra* at 10-11, 20. Nudity *per se* does not constitute obscenity. *Sunshine Book Co. v. Summerfield*, 355 U.S. 372 (1958) (per curiam); *Rosenbloom v. Virginia*, 388 U.S. 450 (1967) (per curiam). Nor can it reasonably be assumed that §§26-2011(c) and 26-2011(d) enumerate the kinds of acts which this Court had in mind when it referred to "lewd exhibition of the genitals." *Miller v. California*, *supra* at 11. *Cf. Hunt v. Keriakos*, 428 F. 2d 606 (1st Cir. 1970), *cert. denied*, 400 U.S. 929 (1970).

Another possible interpretation is that the net effect of the Supreme Court of Georgia's construction is to make §26-2105's definition of obscenity substantially duplicative of §26-2101(b).[11] This interpreta-

[11] There apparently remain differences between the complete sections, for example, with respect to penalties and the fact that §26-2105 applies to performers as well as to exhibitors of performances. In addition, §26-2101(c) deals with "pandering," which is not mentioned in §26-2105.

tion might be supported by the Court's statements that "[t]he trial court correctly charged *this* definition of obscenity [*i.e.*, §26-2101(b)] as the guideline for the jury to apply in this particular case," and that this definition of obscenity, standing by itself, is "considerably more restrictive [*i.e.*, exacting upon the prosecution] than the new test set forth in *Miller v. California*," (App. A, 2-3; emphasis added). Indeed, the Court does not even allude to the *Miller* requirement that an obscenity statute must be limited in application to depictions or descriptions of specifically defined sexual conduct.

Under this second possible interpretation, the statute would clearly be void for overbreadth. For although this case was decided by the Supreme Court of Georgia on July 2, 1973, almost two weeks after *Miller*, such a construction of the statute would not supply the constitutionally requisite limitation. *Miller v. California*, *supra* at 9.

Accordingly, whichever interpretation is adopted, there remain substantial federal questions with respect to the constitutionality of §26-2105 as construed by the Supreme Court of Georgia.

In addition, substantial federal questions as to §26-2105, as construed, arise from the fact that Appellant and other Georgia motion picture exhibitors[12] must now guess at both the geographic parameters

[12] Appellant clearly has standing to challenge the validity of §26-2105 not only as applied to him, but also as it might be applied to others. *See, e.g., Gooding v. Wilson*, *supra* at 521; *Coates v. City of Cincinnati*, *supra* at 616; *Baggett v. Bullitt*, 377 U.S. 360,366 (1964).

and nature of the "local" community standards by which films will be evaluated. They do not and cannot know from the Supreme Court of Georgia's opinion whether "local" means county, city, neighborhood, block, or whatever. As this Court recently noted, such vagueness and uncertainty not only fail to give "fair warning" and not only invite "arbitrary and discriminatory enforcement," but also inhibit the exercise of First Amendment freedoms. *Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972). Moreover, even if they had been defined precisely, Appellant believes that the use of "local" community standards is constitutionally impermissible in any case, and that §26-2105 is invalid for this reason also. Because of the importance of this issue, it is treated as a separate point. *See* Point III, *infra*.

II. **Due process of law.** All of the proceedings below, including those in the Supreme Court of Georgia, are part of the due process of law under which Appellant's conviction must "stand or fall." *Frank v. Mangum*, 237 U.S. 309, 327 (1915).

(1) "A person's right to reasonable notice of a charge against him . . . [is] basic in our system of jurisprudence. . . ." *In re Oliver*, 333 U.S. 257, 273 (1948). "Conviction upon a charge not made would be sheer denial of due process." *DeJonge v. Oregon*, 299 U.S. 353, 362 (1937).

Nevertheless, although Appellant was charged *only* with a violation of §26-2105, the trial judge's instructions to the jury allowed it to convict him of any one of three separate, distinct and substantially different offenses — §26-2105 (exhibition of a film por-

traying acts which would constitute "public indecency"); §26-2101(b) (obscenity); and §26-2101(c) ("pandering" or intent to pander). Since the jury returned only a general verdict of guilty, there exists a substantial possibility that Appellant was convicted upon a charge not made.

(2) In addition, if Appellant's conviction rests on §26-2101(c), it is so totally devoid of evidentiary support as to violate due process in and of itself. *Thompson v. City of Louisville*, 362 U.S. 199 (1960); *Garner v. Louisiana*, 368 U.S. 157 (1961). Indeed, there is not a single word of evidence which even remotely suggested that "pandering" was an issue.

(3) Moreover, since the trial judge's instructions encompassed three separate and distinct statutory provisions and the jury returned only a general verdict of guilty, Appellant has been denied due process if any one of these provisions is unconstitutional. *Stromberg v. California*, 283 U.S. 359, 369-370 (1931).

(4) In affirming Appellant's conviction, the Supreme Court of Georgia "performed a remarkable job of plastic surgery upon the face" of §26-2105, holding that it "really meant something quite different" from what it clearly said. *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 153-154 (1969). *See also*: *Rabe v. Washington*, 405 U.S. 313, 315 (1972) (per curiam).

No fair reading of §26-2105 could have possibly informed Appellant that what it "really" meant was the separate and distinct offense of obscenity as defined by §26-2101(b). *Cohen v. California*, *supra* at 19. Indeed, §26-2105 does not even employ the word

"obscene." It would have taken "extraordinary clairvoyance" for Appellant to have guessed, let alone known, that the clear language of §26-2105 "really" meant what the Supreme Court of Georgia was destined to hold it meant more than 17 months after the commission of the alleged offense. *Shuttlesworth v. City of Birmingham, supra* at 156. *Cf. Chaplinsky v. New Hampshire,* 315 U.S. 568 (1942); *Miller v. California, supra* at 1-2 n. 1.

Accordingly, even assuming §26-2105 would pass constitutional scrutiny as now construed by the Supreme Court of Georgia (but see Point I(3), *supra,* and Point III, *infra*), that construction cannot suffice "to restore constitutional validity to a conviction" that occurred more than a year earlier under the statute "as it was written." *Shuttlesworth v. City of Birmingham, supra* at 155.

(5) Although we have assumed that the Supreme Court of Georgia affirmed Appellant's conviction under §26-2105 (*see* Points I(3) and II(4), *supra*), this is by no means clearly the case. The majority's somewhat ambiguous opinion is susceptible to an interpretation that Appellant's conviction was affirmed under §26-2101, *not* under a radically rewritten version of §26-2105. If this be the case, Appellant has similarly been denied due process of law. *Cole v. Arkansas,* 333 U.S. 196 (1948); *Gregory v. City of Chicago,* 394 U.S. 111 (1969).

In short, however the proceedings below are viewed, Appellant has clearly been denied due process of law.

III. Use of "local" as opposed to statewide, com-

munity standards. In *Miller v. California, supra*, this Court held that the trial court's use of the "contemporary standards of the State of California" in evaluating the material in question was "constitutionally adequate." *Id.* at 19. "People in different *States* vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity." *Ibid.* (emphasis added). *See also*: *Kaplan v. California*, __ U.S. __ (June 21, 1973).

The Supreme Court of Georgia held in this case, however, that it is permissible to apply "local" community standards. Appellant has argued (*see* Point I(3), *supra*) that the Supreme Court of Georgia's failure to define the geographic parameters and nature of the "local" community makes the concept so vague that he and other Georgia motion picture exhibitors "must necessarily guess at its meaning and differ as to its application." *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926).

In addition, even if the applicable "local" standards are defined precisely, it is constitutionally impermissible in any case to apply "local," as opposed to statewide, community standards in evaluating the prurient interest appeal and patent offensiveness of allegedly obscene material.[13] §26-2105 is therefore in-

[13] Applicable community standards do *not* govern determination of whether material is "utterly without redeeming social value" or "lacks serious literary, artistic, political, or scientific value." *See Miller v. California, supra* at 15-19. "The First Amendment protects works which, taken as a whole, have serious literary, artistic, political or scientific value, *regardless* of whether the government or a majority of the people approve of the ideas these works represent." *Id.* at 20 (emphasis added).

valid for this reason also.

First Amendment policy strongly favors the application of statewide, rather than "local," community standards in cases such as this. For when a determination of obscenity made on the basis of "local" standards is affirmed by the highest court of a state, that decision effectively deters sale or exhibition of the material involved throughout the state. Indeed, the film involved in this case has not been shown *anywhere* in the State of Georgia since July 2, 1973. In effect, the standards of one "local" community have dictated what may be seen throughout the State.[14] As pointed out by Justice Hawes in dissent in the Supreme Court of Georgia, approval of "local" community standards is "to place in the hands of the few the tastes and cultural advancement of the many who are members of the greater state community . . ." (App. A, 16). This Court should therefore require that what may be seen by the citizens of an entire state should at least be governed by the community standards of the entire state.

In the leading lower court case on the applicability of *statewide* community standards in obscenity cases, *In re Giannini*, 69 Cal. 2d 563, 72 Cal. Rptr. 655, 446

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[14] *Cf.* Coffin, Ch. J., concurring in *United States v. One Reel of Film*, ___ F. 2d ___ (1st Cir. July 16, 1973). Chief Judge Coffin would hold that "national" community standards must continue to govern obscenity determinations pursuant to 19 U.S.C. §1305, since otherwise the standards of the community surrounding the port of entry would dictate what might be seen across the nation. (Slip opinion, page 8.) The other two judges do not reach this issue. (Slip opinion, pages 2-3, n. 2)

P. 2d 535 (1968), *cert. denied*, 395 U.S. 910 (1969), the Supreme Court of California concluded that:

> . . . on balance a community comprised of the entire State of California is the more appropriate. This standard avoids administrative problems in determining the exact scope of the smaller community: whether it should be city, county, individual neighborhood within a city, or whatever. Moreover, a strong policy favors uniformity in application of state criminal law [citation omitted]; we promote this policy by assuring that application of the obscenity law in this state will be based on a uniform "community." [446 P. 2d at 547.]

Accordingly, to the extent that this Court's decisions of June 21 and 25, 1973, may have left this question unclear or unresolved, it presents a substantial federal question.[13]

IV. **"Carnal Knowledge" is not obscene.** This Court "must always remain sensitive to any infringement on genuinely serious literary, artistic, political, or scientific expression." *Miller v. California*, *supra* at 8. Accordingly, its "independent review of constitutional claims" continues to be available "when necessary." *Id.* at 10. And, as Justice Gunter said in dissent in the Supreme Court of Georgia, if there is ever to be a case in which such review is necessary, "then the case at bar is the case" (App. A, 11).

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[13] The Supreme Court of the State of Washington, for example, has already held that the community standards to be applied in accordance with this Court's decisions of June 21 and 25, 1973, are *statewide* rather than "local." *State v. J-R Distributors, Inc.* 512 P. 2d 1049, 1065 (July 27, 1973).

"Carnal Knowledge" is one of the most widely acclaimed films of recent years,[16] and appeared on many "10 Best" lists for 1971,[17] the year in which it was first released. It combines the talents of many of America's leading contemporary artists — *e.g.*, Mike Nichols (producer-director), Jules Feiffer (screenwriter), Jack Nicholson (actor). The film deals with sex, but then sex "has indisputably been a subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern." *Roth v. United States, supra* at 487. "[S]ex and obscenity are *not* synonymous." *Ibid.* (emphasis added).

Yet, by a vote of 4-3, the Supreme Court of Georgia has found "Carnal Knowledge" to be obscene.[18] This finding, which has understandably become a subject of widespread public concern,[19] raises

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[16] *See, e.g.*, the various reviews cited in Justice Gunter's dissent (App. A, 8-9).

[17] Including *The Oakland Tribune* (Robert Taylor); *The New York Times* (Vincent Canby); *The Nashville Tennesseean* (Harry Haun); *The Cleveland Plain Dealer* (Emerson Batdorff); *The Houston Chronicle* (Jeff Millar); and *The Denver Post* (Barry Morrison).

[18] The Court found the film to be obscene *per se*. Appellant did not permit minors to view the film (R. 5, 49). Nor is there any evidence of "obtrusive" exhibition or, despite the trial judge's instructions, "pandering."

[19] *See, e.g.*, "See No Evil," *Time*, July 16, 1973, page 73, column 2, for the view that the Supreme Court of Georgia's decision "indicates how drastically the Supreme Court's rules may be interpreted, or misinterpreted, by local authorities trying to decide what may or may not be seen by the public."

"the gravest constitutional problems." *Roth v. United States*, *supra* at 498 (opinion of Harlan, J.).

By whatever constitutionally permissible standard it is evaluated, "Carnal Knowledge" cannot possibly be characterized as a "public portrayal of hard core sexual conduct for its own sake." *Miller v. California*, *supra* at 20. It is far superior in accomplishment, and far less explicit in treatment, than material which this Court has already held *not* to be obscene. *See, e.g.*, *Kois v. Wisconsin*, 408 U.S. 229 (1972) (per curiam).

Indeed, if the film itself is the best evidence of what it represents, *Paris Adult Theatre I v. Slaton*, *supra* at 7, then a viewing of "Carnal Knowledge" clearly shows that it is *not* obscene.[20] The Supreme Court of Georgia's finding to the contrary is not only incorrect, but is also "wholly out of step with current American standards." *Memoirs v. Massachusetts*, 383 U.S. 413, 458 (1966) (dissenting opinion of Harlan, J.).

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[20] A print of the film is on file with the Clerk of this Court as part of the Record in the Supreme Court of Georgia.

CONCLUSION

For the reasons set forth above, the judgment of the Supreme Court of Georgia should be reversed.

Respectfully submitted,

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APPENDIX A

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IN THE
SUPREME COURT OF GEORGIA

Decided: July 2, 1973

27692. JENKINS v. THE STATE

The evidence amply supports the verdict of guilty by the showing of the film Carnal Knowledge in violation of the definition of distributing obscene materials under Georgia statutes.

JORDAN, Justice. Billy Jenkins appeals his conviction and sentence for the offense of distributing obscene materials. The conviction is based on the fact that he exhibited in the film Carnal Knowledge in a movie theater in Albany, Georgia.

The threshold question to be decided is whether or not the showing of the film Carnal Knowledge violates Code Ann. Ch. 26-21 prohibiting the distribution of obscene materials. The trial jury, under proper instructions from the court, has found the defendant guilty. After a review of the record and a viewing of the film by this court we affirm.

Code Ann. § 26-2101(b) provides that "Material is obscene if considered as a whole, applying com-

munity standards, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and utterly without redeeming social value and if, in addition, it goes substantially beyond customary limits of candor in describing or representing such matters." The accusation charges the defendant "with the offense of distributing obscene material." The accusation without expressly referring to Code Ann. § 26-2105 is then cast in the language of the prohibited acts as defined in Code Ann. § 26-2011. The appellant contends that the accusation is defective in that it fails to include the definition of obscene materials as defined in Code Ann. § 26-2101(b). This view is adopted by the minority which seizes upon this alleged defect to hold Code Ann. § 26-2105 unconstitutional.

It is our view that a statute can provide criminal punishment without the definition of obscenity being included within that specific code section. The chapter in which Code Ann. § 26-2105 is included at its very beginning amply defines obscenity and this particular Code section, which is merely a part of the chapter, must be read in accordance with the entire chapter. This court has held that sections of the code which relate to the same subject matter shall be construed together. See *Touchton v. Echols County*, 211 Ga. 85, 87 (84 SE2d 81). It seems clear then that the definition of obscenity as set forth in the chapter applies to all of the code sections dealing with this same question.

The trial court correctly charged this definition of obscenity as the guideline for the jury to apply in this particular case. In *Roth v. United States*, 354

U.S. 476, it was held that "obscenity is not within the area of constitutionally protected speech or press." *Memoirs v. Mass.*, 383 U.S. 413, gave a test of obscenity to the effect that it must be established that the dominant theme appeals to prurient interest, the material affronts contemporary community standards, and is utterly without redeeming social value. This test has been included in our law (Code Ann. § 26-2101(b)) thus making our present statute considerably more restrictive than the new test set forth in the recent case of *Miller v. California*, No. 70-73, 41 LW 4925. The *Miller* case, supra, further held that juries can consider State or local community standards in lieu of "national standards," thereby bringing the holding of this court in *Gornto v. State*, 227 Ga. 46 (178 SE2d 894) in line with *Miller*, supra, on this point.

This court has held that the exhibition of an obscene motion picture is a crime involving the welfare of the public at large, since it is contrary to the standards of decency and propriety of the community as a whole. *Evans Theatre Corporation v. Slaton*, 227 Ga. 377 (180 SE2d 712). In *Slaton v. Paris Adult Theater, I*, 228 Ga. 343 (185 SE2d 768) this court held that the films involved in that case were "hard core" pornography and that the commercial exhibition of such pictures is not protected by the first amendment. The Supreme Court of the United States which in effect affirmed the *Paris* case, supra, held that States have a legitimate interest in regulating commerce in obscene material and its exhibition in places of public accommodation, including "adult" theaters; further holding that the exhibition of obscene material in such places of public accommoda-

tion is not protected by any constitutional doctrine of privacy, and that a commercial theater cannot be equated with a private home. See *Paris Adult Theater v. Slaton*, No. 71-1051, 41 LW 4935.

We hold that the evidence in this record amply supports the verdict of guilty by the showing of the film Carnal Knowledge in violation of the definition of distributing obscene materials under our Georgia Statutes.

Judgment affirmed. All the Justices concur, except Undercofler, Hawes, and Gunter, JJ., who dissent.

In the Supreme Court of Georgia

27692. JENKINS v. THE STATE (607)

GUNTER, Justice (dissenting). The majority has today affirmed the criminal conviction of the appellant for showing the motion picture "Carnal Knowledge" to a theatre audience in Dougherty County, Georgia. The majority has held that the exhibition of this film in this "local community" is not entitled to the protection of the First Amendment as applied to Georgia and this "local community" by the Fourteenth Amendment. I am in disagreement with the majority, and I respectfully dissent. Having viewed this film with the other members of the Court, I must say, quite subjectively of course, that it is inconceivable to me that this work can be relegated to that area of verbal, written, and performing expression which falls outside of the protection of the First Amendment to the Constitution of the United States. Today's majority decision has drastically narrowed the concept of the First Amendment as applied to the performing arts in Georgia and "local communities" in Georgia.

I am in disagreement with my brothers of the majority for several reasons, and I shall attempt to set them forth in this dissent.

I.

The decision of the Supreme Court of the United States in *MILLER v. CALIFORNIA*, 41 LW 4925, (decided June 21, 1973), inaugurated a new era in the continuing constitutional contest between obscenity-pornography and the First Amendment. As the

MILLER decision said, the history of the Supreme Court's obscenity decisions has been "somewhat tortured". 41 LW at 4926. I would go one step further and say that the Supreme Court's decisions in this area, handed down during the recent and relatively short period of the First Amendment's entire history, have made it impossible for a dealer in such material to make a determination, with any degree of certainty, as to whether the material falls within the protection of the First Amendment or falls outside of its protection.

MILLER gave a new definition of pornographic, unprotected material; *MILLER* laid down basic guidelines for the trior of fact to use in determining what is protected material from what is unprotected material; *MILLER* changed the yardstick for measuring obscene material from "national standards" to "contemporary community standards"; and *MILLER* reiterated that if the application of its definitions, guidelines, and standards do not sufficiently protect First Amendment rights in any case, then First Amendment values are "adequately protected by the ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary".

In the case at bar the film "Carnal Knowledge" was shown by the appellant to a theatre audience in Dougherty County, Georgia; a warrant and accusation were issued against the appellant charging him with having committed a crime by showing the film; and the appellant's' trial and conviction by a jury followed. All of this took place in the first four months of 1972, long before the changing of definitions, guide-

lines, and yardsticks of measurement by the *MILLER* decision rendered June 21, 1973. Yet the *MILLER* criteria have been applied by the majority in this case in affirming the appellant's conviction. That cannot be done, and for the majority to have done it in this case is, in my view, a denial of due process of law to the appellant.

In 1972 the appellant had every legal right to believe that the yardstick that he was to use in distinguishing unprotected from protected material was "national standards". The Supreme Court's opinion in *JACOBELLIS v. OHIO*, 378 US 184, (1964), now relegated by *MILLER* to a mere plurality decision, said: "We thus reaffirm the position taken in *ROTH* to the effect that the constitutional status of an allegedly obscene work must be determined on the basis of a national standard." Six Justices made up the *JACOBELLIS* majority, and not one of them gave the slightest indication that a national standard was not the yardstick to be applied.

Understandably then, appellate court judges or persons dealing in material that might be unprotected legitimately used a national standard yardstick to determine for themselves whether the material was protected or not. In the case of *FELDSCHNEIDER v. THE STATE*, 127 Ga. App. 745, (1972), the Court of Appeals of Georgia said at page 749: "The trial court erred in limiting the meaning of contemporary community standards to 'the local community —to your own community.' If we were allowed to apply and be guided by the recent *GORNTO* case by the Supreme Court of our own state, the trial court's charge would have been correct; but we are controlled

by the three recent decisions of the United States Supreme Court, to wit, *JACOBELLIS, MANUAL ENTERPRISES* and *ROTH*, supra, and consequently, we hold that the trial court's charge in these two instances constituted reversible error." To the same effect is the decision in *FISHMAN v. STATE*, 128 Ga. App. 505, (1973), where a 7-2 majority of our Court of Appeals said on page 508: "The community standards to be applied are those of the national, not the immediate local community."

In January, 1972, when the motion picture "Carnal Knowledge" was exhibited by the appellant, the film had shown in the major cities of the nation, the major cities in Georgia, and in many of the cities and towns in Georgia without any contention being publicly made that it was obscene-pornographic.

"Carnal Knowledge" was reviewed in July, 1971, in the *Saturday Review*, the *Washington-Post*, the *New York Daily News*, *Time*, the *Atlanta Constitution*, and the *Atlanta Journal*. None of these reviews gave the slightest indication that the film was obscene-pornographic. Terry Kay, *Atlanta Journal* amusements editor, concluded the review in that Georgia paper as follows: "In the end there is no real triumph for the characters. Different attitudes, perhaps, but no triumph.

"The effect is with the viewer, who — like it or not — has been stung to the quick by a prodding of human values.

"So what does 'Carnal Knowledge' tell us? Simply that we are victims, or subjects to be victimized, by

the very life-system we create for ourselves.

" 'Carnal Knowledge' says it with sex. It is theatrical that way — sex being the denominator common to everyone. But it could be said about any facet of our lives.

"It is a movie that will be controversial in the heaviest sense of the word, but it is still one of the best that we have had in a long time."

In *MILLER* the Chief Justice of the United States said: ". . . a 'national standard' of First Amendment protection enumerated by a plurality of this Court, was correctly regarded at the time of the trial as limiting State prosecution under the controlling case law." However, the Chief Justice then went on to say that since the appellant in that case did not raise the "national standard" issue at the trial but only on appeal, the trial court's charge to the jury that it consider state community standards was not a constitutional error.

To me, this retroactive application of the *MILLER* yardstick as opposed to the *JACOBELLIS* yardstick has the effect of saying that a theatre operator could rely on *JACOBELLIS* in January, 1972, in deciding whether to exhibit a film, but in April, 1972, when he was tried before a jury for exhibiting the film, it was all right for the Court and jury to completely ignore the standard established by *JACOBELLIS* and apply a different standard which had not at the time of the trial been enunciated and which would not be established by the Supreme Court of the United States until June 21, 1973.

I should add that in the present case the "national standard" issue was raised by the appellant in both the trial court and the appellate court.

The majority here today has retroactively applied the *MILLER* "contemporary community standards" yardstick in affirming a criminal conviction, thereby depriving appellant of his legal right in January, 1972, to have applied a "national standard" yardstick in making his decision that the film "Carnal Knowledge" came within the protection of the First Amendment.

If, between the time of *JACOBELLIS* and the time of *MILLER*, the Justices of the Supreme Court of the United States did not know what yardstick to apply, and then changed rather dramatically from one to the other, how can a theatre manager in Georgia be faulted, much less criminally convicted, for having made a decision in 1972 based on the *JACOBELLIS* national standard?

The retroactive application of *MILLER* in this manner in this case by the majority has, in my opinion, deprived appellant of due process of law under both the Georgia and Federal Constitutions.

II.

Assuming that what I have said heretofore, to the effect that the retroactive application of local community standards in this case is constitutionally impermissible, is incorrect, and the majority today holds that I am wrong on this point, then the film "Carnal Knowledge" is, in my judgment, entitled to the protection of the First Amendment even after applying local contemporary community standards.

MILLER, as noted earlier, reasserts that First Amendment values "are adequately protected by the ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary."

The so-called plurality opinion in *JACOBELLIS* said: "Hence we reaffirm the principle that, in 'obscenity' cases as in all others involving rights derived from the First Amendment guarantees of free expression, this Court cannot avoid making an independent constitutional judgment on the facts of the case as to whether the material involved is constitutionally protected. . . . We would reiterate . . . that 'the portrayal of sex, e.g. in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press.' . . . It follows that material dealing with sex in a manner that advocates ideas, . . . or that has literary or scientific or artistic value or any other form of social importance may not be branded as obscenity and denied the constitutional protection."

As I read the majority opinion in *MILLER*, it approves and reaffirms these enunciations procreated into constitutional law in *JACOBELLIS* by a mere plurality of the Justices.

If there ever has been or will be a case where independent appellate review of the facts as to whether the material involved is constitutionally protected is necessary to protect First Amendment values, then the case at bar is the case.

This Court has conducted an independent review. We have seen the film "Carnal Knowledge".

Four members of this Court deem it to be obscene, pornographic, unprotected material. Three members of this Court, including the writer, would hold it to be constitutionally protected material.

In Division Four of the *MILLER* opinion the Chief Justice said: "The dissenting Justices sound the alarm of repression. . . . These doleful anticipations assume that Courts cannot distinguish commerce in ideas, protected by the First Amendment, from commercial exploitation of obscene material."

My experience with this one case teaches me that the "alarm of repression" was validly sounded; it also teaches me that the *MILLER* majority's assumption, that Courts can distinguish commerce in ideas that is protected from commercial exploitation of obscene material that is not protected, is a too optimistic assumption. The instant case is the proof that is in the pudding; material is pornographic and unprotected in the subjective mind and senses of one judge; and that same material has serious literary or artistic value in the subjective mind and senses of another judge; all of which leads me to repeat that often-stated assertion by lawyers: a majority of the Justices of the Supreme Court of the United States is not final because the members of that majority are infallible, — that majority is infallible only because it is final.

If the motion picture "Carnal Knowledge" is not entitled to judicial protection under the First Amendment's umbrella, then future productions in this art form utilizing a sexual theme are destined to be obscenely soaked in the pornographic storm.

III.

The appellant's conviction should not be affirmed because he was not legally accused of having committed a crime.

A warrant was issued for the appellant for having violated Ga. Code § 26-2105. This Code Section was enacted by the Georgia legislature in 1971, and this case is the first time that this Court has given consideration to it.

This statute, as relevant in this case, provides as follows:

> "(a) Every person who, during the course of a . . . motion picture, engages in conduct which would be public indecency under § 26-2011 if performed in a public place, shall be guilty of participation in indecent exposure and upon conviction shall be punished as for a misdemeanor.
>
> "(b) Every person who . . . knowingly exhibits . . . a motion picture . . . containing such conduct shall be guilty of a misdemeanor."

Georgia Code § 26-2011, our public indecency statute referred to in Code § 26-2105, is as follows:

> "A person commits public indecency when he performs any of the following acts in a public place and upon conviction shall be punished as for a misdemeanor: (a) An act of sexual intercourse; (b) a lewd exposure of the sexual organs; (c) a lewd appearance in a state of partial or complete nudity; (d) a lewd caress or indecent fondling of the body of another person."

It is thus seen that the conduct referred to in Code § 26-2105 is "public indecency" or "indecent exposure". Code § 26-2105 does not make reference in any manner whatsoever to "obscene materials".

Prior to arraignment and trial the appellant attacked and moved to dismiss the Accusation that was preferred against him based on the warrant. His contention was that the warrant and the Accusation were based on the 1971 Georgia statute (Code § 26-2105), and that the 1971 Georgia statute was unconstitutional. The trial judge overruled these constitutional attacks.

In my opinion the 1971 Georgia statute is patently unconstitutional. This statute attempts to transfer the crime of public indecency into the motion picture art form. This cannot be done if the First Amendment means anything at all, and if a motion picture is a work or material that enjoys protection under the First Amendment. Conduct performed in person and in public, such as indecent exposure, is not protected by the First Amendment. Conduct portrayed in the motion picture art form is protected by the First Amendment unless the portrayal, considered in the entire context of the motion picture, lacks "serious literary, artistic, political, or scientific value" (*MILLER v. CALIFORNIA* standard) or is "utterly without redeeming social value" (pre-*MILLER v. CALIFORNIA* standard).

In other words, a single or even several acts of public indecency portrayed in a motion picture or described by the written word in a novel cannot be defined as a crime because of the protection given to

motion pictures and novels as forms of expression by the First Amendment. The entire motion picture or the novel must be considered as a whole in determining whether the work is pornographic, thus falling outside of the protection of the First Amendment.

The *MILLER* opinion says: "State statutes designed to regulate obscene materials must be carefully limited. See *INTERSTATE CIRCUIT, INC. v. DALLAS*, supra 390 US, at 682-685 (1968)."

The 1971 Georgia statute is not "carefully limited". It says that an actor who portrays one or more acts of indecent exposure in a motion picture is guilty of having committed a crime. It further says that one who exhibits a motion picture containing such a portrayal is guilty of a crime.

I think that this 1971 Georgia statute is directly violative of the First Amendment, and I further think that it violates the Fourteenth Amendment in that it is overly broad.

The warrant in this case, and the Accusation based on the warrant, charged the appellant only with having violated Code § 26-2105. In my view this statute is unconstitutional. A criminal charge cannot be founded on a void statute. Therefore the Accusation charged no crime at all, and it should have been dismissed by the trial judge when properly attacked in the trial court.

It follows that I would reverse this criminal conviction.

I respectfully dissent.

HAWES, Justice, dissenting. I join in the dissenting opinion of Mr. Justice Gunter, a classic of legal reasoning and First Amendment wisdom, and I would add nothing to what has been said were it not for my concern for the grave danger to free speech and expression inherent in the majority opinion and about which I cannot here remain silent.

Two aspects of the opinion of the majority which are of most concern to me are the following: (1) the tacit approval of small towns and hamlets as being the "community" from which the standard for obscenity is drawn; and (2) the determination by four members of this court, upon an independent appellate review, that the film *Carnal Knowledge* is obscene, that is, that it has no artistic or literary value and is "utterly without redeeming social value." To give approval to the first would be to place in the hands of the few the tastes and the cultural advancement of the many who are members of the greater state community and to deny in large measure the basic freedom of individuals to participate as they will in the general commerce of ideas. And to approve of the latter would be to equate realistic commentary on our sexual natures in a social context with that of obscenity, an equivalence surely belied as a matter of constitutional law and as a matter of fact. Certainly, the film under consideration here is not the kind of hard-core pornography we removed from public consumption in *Slaton v. Paris Adult Theater I*, 228 Ga. 343 (185 SE2d 768) (1971).

I add these few remarks only because I believe if the majority opinion is accepted we shall have suffered a serious injury to free speech and free expression in Georgia.

APPENDIX B

27692

SUPREME COURT OF GEORGIA

ATLANTA, July 2, 1973

The Honorable Supreme Court met pursuant to adjournment.

The following judgment was rendered:
Billy Jenkins v. The State.

This case came before this court upon an appeal from the Superior Court of Dougherty County; and, after argument had, it is considered and adjudged that the judgment of the court below be affirmed. All the Justices concur except Undercofler, Hawes & Gunter, JJ., dissent.

BILL OF COSTS, $30.00

SUPREME COURT OF THE STATE OF GEORGIA

CLERK'S OFFICE, ATLANTA, AUG. 14, 1973

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia, and that Smith, Gardner, Wiggins, Geer & Brimberry paid the above bill of costs.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Joline B. Williams, *Clerk*

APPENDIX C

IN THE

SUPREME COURT OF GEORGIA

BILLY JENKINS,	:	
Appellant	:	
vs.	:	CASE NO. 27692
THE STATE,	:	
Appellee	:	

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that BILLY JENKINS, the Appellant above named, hereby appeals to the Supreme Court of the United States from the final order of the Supreme Court of Georgia, affirming the judgment of conviction, entered herein July 2, 1973. This appeal is taken pursuant to 28 U.S.C. §1257 (2).

TENCH C. COXE
Attorney for Appellant

OF COUNSEL:

TROUTMAN, SANDERS, LOCKERMAN
& ASHMORE
1500 Candler Building
Atlanta, Georgia 30303

[The above Notice of Appeal was filed on September 20, 1973, and all parties required to be served have been served. The Certificate of Service has been omitted from this Appendix.]

APPENDIX D

WARRANT

THE STATE
VERSUS

Billy Jenkins

Charge VIOLATION GEORGIA CODE SECTION 26-2105

Lynn L. Stout Prosecutor

The above defendant made bond on the ____ day of _____, 19____

_____
Sheriff's Office

WITNESS:

Lynn L. Stout - Investigator

J. Wayne Parrish - Investigator

Warrant delivered to sheriff's office

Date February 10, 1972

APPENDIX D

GEORGIA, Dougherty County

Personally Comes Lynn L. Stout Who, on oath, says to the best of his knowledge and belief Billy Jenkins did, in said County, on the 9th day of February, 19 72, commit the offense of violation of Georgia Code Section 26-2105.

And deponent makes this affidavit that a warrant may issue for his arrest.

_____ (Seal)

Sworn to and subscribed before me 10th day of February, 19 72

_____

Judge City Court, Albany, Georgia

GEORGIA, Dougherty County

To any Sheriff, Constable or Marshal of said State—GREETING:

Lynn L. Stout Makes oath as above which is hereby made part of this warrant. You are hereby commanded to arrest Billy Jenkins and bring him before me or some other judicial officer of said County to dispose of as the law directs. Fail not.

Witness my hand and seal February 10, 1972.

_____ (Seal)

Judge City Court, Albany, Georgia

A commitment hearing was held this _____ day of _____ 19____ and after hearing evidence it is ordered that the defendant be committed for said offense in default of his giving bond, with good security, in the sum of _____ Dollars for his appearance at the Superior Court to be held on the third Monday in _____ 19____.

Witness my hand and seal _____ 19____.

_____

Judge Pro Hac Vice City Court, Albany, Georgia

APPENDIX E

No._____

SUPERIOR COURT,
DOUGHERTY COUNTY

March Term, 19 72

THE STATE
vs.

Billy Jenkins

DISTRIBUTING OBSCENE MATERIAL

ACCUSATION

Foreman.

ROBERT W. REYNOLDS,
District Attorney

Lynn Stout
Prosecutor.

Received in Open Court from the sworn Grand Jury Bailiff, and filed in office this 6th day of March 19 72.

Clerk.

APPENDIX E

GEORGIA, DOUGHERTY COUNTY:

THE GRAND JURORS, selected, chosen and sworn for the County of Dougherty, to-wit:

I _____ Foreman.

Robert W. Reynolds, District Attorney,

on information of Lynn Stout

In the name and behalf of the citizens of Georgia, charge and accuse Whitfield Woodall and Billy Jenkins with the offense of Distributing Obscene Material for that the said accused, in the County aforesaid, on the 13th day of January, Nineteen Hundred and Seventy-Two, did then and there knowingly exhibit a motion picture to the general public which motion picture contained conduct showing (a) an act of sexual intercourse, (b) a lewd exposure of the sexual organs, (c) a lewd appearance in a state of partial or complete nudity, (d) a lewd caress or indecent fondling of another person

contrary to the laws of said State, the good order, peace and dignity thereof.

ROBERT W. REYNOLDS, District Attorney

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of this Jurisdictional Statement to the Supreme Court of the United States, upon counsel for Appellee, Mr. Tony H. Hight, Suite 406, 501 Pulliam Street, S.W., Atlanta, Georgia 30312 and B. Sam Ingram, Jr., District Attorney, Pro Tem, City-County Government Building, Albany, Georgia, by depositing copies of said Jurisdictional Statement in the United States Mail properly addressed with sufficient postage thereon to insure delivery.

I hereby certify that all parties required to be served have been served.

This .... day of ....., 1973.

WILLIAM H. SCHRODER, JR.
Attorney for Appellant

Troutman, Sanders, Lockerman
& Ashmore
1500 Candler Building
Atlanta, Georgia 30303

OCT 5 1973

DEC 10 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1973

No. 73 557

BILLY JENKINS,

Appellant,

v.

STATE OF GEORGIA,

Appellee.

MOTION OF ASSOCIATION OF AMERICAN PUBLISHERS, INC., MAGAZINE PUBLISHERS ASSOCIATION, INC., PERIODICAL AND BOOK ASSOCIATION OF AMERICA, INC., INTERNATIONAL PERIODICAL DISTRIBUTORS ASSOCIATION, INC., COUNCIL FOR PERIODICAL DISTRIBUTORS ASSOCIATIONS, AMERICAN BOOKSELLERS ASSOCIATION, INC. and NATIONAL ASSOCIATION OF COLLEGE STORES, INC. TO FILE A BRIEF AS *AMICI CURIAE* IN SUPPORT OF APPELLANT'S JURISDICTIONAL STATEMENT AND BRIEF *AMICI CURIAE*

EDWARD C. WALLACE and
WEIL, GOTSHAL & MANGES
Attorneys for Amici
767 Fifth Avenue
New York, New York 10022

HEATHER GRANT FLORENCE
Of Counsel

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IN THE

Supreme Court of the United States

October Term, 1973

No. .....

BILLY JENKINS,

Appellant,

v.

STATE OF GEORGIA,

Appellee.

MOTION OF ASSOCIATION OF AMERICAN PUBLISHERS, INC., MAGAZINE PUBLISHERS ASSOCIATION, INC., PERIODICAL AND BOOK ASSOCIATION OF AMERICA, INC., INTERNATIONAL PERIODICAL DISTRIBUTORS ASSOCIATION, INC., COUNCIL FOR PERIODICAL DISTRIBUTORS ASSOCIATIONS, AMERICAN BOOKSELLERS ASSOCIATION, INC. and NATIONAL ASSOCIATION OF COLLEGE STORES, INC. TO FILE A BRIEF AS *AMICI CURIAE* IN SUPPORT OF APPELLANT'S JURISDICTIONAL STATEMENT

Statement

The Association of American Publishers, Inc., the Magazine Publishers Association, Inc., the Periodical and Book Association of America, Inc., the International Periodical Distributors Association, Inc., the Council for Periodical Distributors Associations, the American Booksellers Asso-

ciation, Inc. and the National Association of College Stores, Inc. (collectively referred to herein as "*Amici*") hereby seek leave to file a brief as *amici curiae*, pursuant to Rule 42 of the Rules of the Supreme Court of the United States, in support of the Jurisdictional Statement filed by appellant herein.

On September 24, 1973 counsel for *Amici* wrote to counsel for appellant and to counsel for appellee requesting consent for *Amici* to file a brief as *amici curiae* in this proceeding. Counsel for appellant gave such consent by letter dated September 27, 1973, filed with the court and counsel for appellee has not yet responded to the request.

The *Amici*

The Association of American Publishers, Inc. is a not-for-profit trade association composed of more than 260 publishers, including many university presses and religious book publishers. They publish, in the aggregate, the vast majority of all general, educational, and religious books and materials sold in the United States through thousands of book, department, and drug stores, as well as newsstands and other outlets.

The Magazine Publishers Association, Inc. is a national trade association, founded in 1919, whose membership is composed of more than 134 publishers representing more than 451 magazines and other periodical publications with a combined readership of more than 89% of the adults in the United States.

The Periodical and Book Association of America, Inc. is a not-for-profit association for magazine and paperback

book publishers, who share a common interest in the sale of their products through independent wholesaler distribution channels throughout the United States.

The International Periodical Distributors Association, Inc. is a trade association of twelve national periodical distributors who each distribute, or arrange for distribution, of paperback books and periodicals throughout the United States, for ultimate distribution to retailers and the public.

The Council for Periodical Distributors Associations is a not-for-profit corporation founded 18 years ago that is the national association of 500 local independent wholesale distributors of magazines, comics, paperback books and newspapers in the United States and Canada.

The American Booksellers Association, Inc. is a national trade association representing 3,968 booksellers, including all the major ones. The members consist of chain operations, private bookstores, department store book departments and university book stores.

The National Association of College Stores, Inc. is a trade association composed of 2,250 stores serving more than seven million college students and faculty. Universities or colleges own 1,700 of these stores.

Interest of the *Amici*

This appeal is from the affirmance by the Supreme Court of the State of Georgia of the conviction of Billy Jenkins for exhibiting the motion picture "Carnal Knowledge" in a movie theatre in the city of Albany, Georgia.

None of the *Amici* at anytime has had any involvement with the creation, production, distribution or exhibition of this film; indeed, none is in any way involved in the motion picture industry. Accordingly, *Amici* will not discuss in detail the particular film or issues directly relating to this particular prosecution or Georgia law. Rather, as book and magazine publishers, distributors, wholesalers and retailers *Amici* are particularly sensitive to the detrimental effect of this conviction and the opinion below on the First Amendment rights of all citizens and their implications for the major legislative activity likely to result from *Miller* v. *California*, —— U.S. ——, 93 S.Ct. 2607 (1973). As associations representing businesses engaged in publishing and disseminating books and periodicals, *Amici* join in this motion and brief to urge the Court not only to accept this appeal and reverse the conviction, but to assist the *Amici* and others by providing clear guidelines for the interpretation and application of the constitutionally required tests and standards for dealing with non-protected materials issued by this Court in *Miller* v. *California, supra,* and its companion cases on June 21, 1973.

The concern of the *Amici* about the effect of this Court's opinion in *Miller* and its companion cases on the business activities of the members of the *Amici* and on the rights of free expression for all, led many of the associations herein represented to file a motion and brief as *amici curiae* in support of the Petition for Rehearing in *Kaplan* v. *California*, —— U.S. ——, 93 S.Ct. 2680 (1973). In that brief, *Amici* expressed concern that "[t]he decisions rendered in *Miller* and its companion cases have engendered tremendous confusion among educators, authors, publishers, dis-

tributors and law enforcement officials as to the meaning and proper implementation of this Court's three-pronged test."

In view of subsequent law enforcement and legislative activity as well as judicial decisions—particularly the decision of the Supreme Court of Georgia in this case—*Amici's* concern unfortunately has been proven well founded. Indeed, developments since *Miller* compel us to add to that list some members of the judiciary who, in the short time since *Miller*, have interpreted and applied the new tests and standards in such a variety of ways that the courts appear to be as deeply confused as to the meaning of this Court's guidelines as anyone else.[1]

The immediate practical necessity for more specific guidelines and clearer standards to dispel the layers of confusion and uncertainty confronting all affected groups is obvious. Because the *Miller* decision places the burden of regulation as well as enforcement on the States, many legislators already are or shortly will be assessing their obscenity laws for the purpose of amending them or enacting entirely new laws in light of the new *Miller* standard. Many will believe their existing statutes do not take advantage of the extent of regulation *Miller* appears to allow;[2] others will find their laws threatened or already

1. The pervading difference between the four judge majority and three judge minority in the decision below was a sharp disagreement on the proper interpretation of the decision of this Court in *Miller, supra.*

2. A new and more sweeping obscenity law was enacted in Oregon on July 25, 1973, barely a month after the decision in *Miller, supra* (S. 708, Chapter 699, 1973 New Laws 847); bills to enact more sweeping obscenity laws are pending in the State legislatures now in session, such as Pennsylvania (S. 737), and countless more may be expected in January, when most State legislatures reconvene.

stricken as unconstitutional under *Miller*.[3] Only clearer guidelines by this Court are likely to prevent the enactment of State legislation which is unconstitutional because of First Amendment or due process deficiencies.

As this Court noted in *Miller*, —— U.S., at ——, 93 S. Ct., at 2614, there are "inherent dangers of undertaking to regulate any form of expression." It insisted that "State statutes designed to regulate obscene materials must be carefully limited." We believe that only a clear statement by this Court on this appeal will serve to establish those careful limitations.

The chilling effect of the vague standards of *Miller* already has been felt throughout the nation. The erosion of First Amendment freedoms by the abuse which this Court's recent decisions have suffered at the hands of some law enforcement officials and citizens and the conflicting interpretations of some judges will be compounded by ostensibly lawful censorship resulting from new legislation if not "carefully limited".

Thus, it is essential that the Court now clarify its June 21 decisions and mark the limits of obscenity laws and proceedings, if there are to be such limits at all. Only by enunciating clearer guidelines for each of the three prongs of

3. New Jersey's law was declared unconstitutional in *Hamar Theatres, Inc.* v. *Cryan*, D. N.J., —— F.2d —— (3 judge ct., July 26, 1973); New York's law was also found unconstitutional in *Redlich* v. *Capri Cinema*, —— Misc. 2d —— (Sup. Ct. N.Y. Co. 1973); the Supreme Court of Indiana declared its obscenity law unconstitutional in *Mohney* v. *Indiana*, No. 471 S 94 and *Stroud* v. *Indiana*, No. 570 S 107, —— Ind. —— (August 21, 1973); and a judge in Louisiana dismissed an obscenity case after finding the Louisiana statute failed to meet the requirements of *Miller, supra*, in *Giarrusso* v. *Excalibor Books, Inc.* (Civ. Dist. Ct. for Orleans, July 13, 1973).

the *Miller* test and by clarifying the due process requirements for all obscenity proceedings will understanding instead of confusion prevail with the citizenry, the legislators, the law enforcement officials and the judiciary.

In view of the foregoing, the *Amici* seek leave to file the brief following hereafter.

Respectfully submitted,

WEIL, GOTSHAL & MANGES
Attorneys for Amici

By /s/ EDWARD C. WALLACE
EDWARD C. WALLACE

HEATHER GRANT FLORENCE
Of Counsel

IN THE

Supreme Court of the United States

October Term, 1973

No. .....

BILLY JENKINS,

Appellant,

v.

STATE OF GEORGIA,

Appellee.

BRIEF OF ASSOCIATION OF AMERICAN PUBLISHERS, INC., MAGAZINE PUBLISHERS ASSOCIATION, INC., PERIODICAL AND BOOK ASSOCIATION OF AMERICA, INC., INTERNATIONAL PERIODICAL DISTRIBUTORS ASSOCIATION, INC., COUNCIL FOR PERIODICAL DISTRIBUTORS ASSOCIATIONS, AMERICAN BOOKSELLERS ASSOCIATION, INC. and NATIONAL ASSOCIATION OF COLLEGE STORES, INC. AS *AMICI CURIAE* IN SUPPORT OF APPELLANT'S JURISDICTIONAL STATEMENT

Interest of the *Amici*

This is set forth above in the motion to the Court.

ARGUMENT

POINT I

The decision below resulted from a misinterpretation of each of the three prongs of the *Miller* test.

Passing the violations of due process resulting from the lower court's treatment of Georgia statutes and its purported application of the *Miller* standards in a proceeding arising out of acts occurring before June 21, 1973,[4] *Amici* submit that, more importantly, the Georgia court misconstrued each and every one of the *Miller* tests.

As this Court stated in *Miller*, —— U.S., at ——, 93 S.Ct., at 2615:

> "The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest, (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value." (citations omitted)

In attempting to apply these tests, the court below proceeded on the assumptions: (1) that "contemporary community standards" could be *local* as distinguished from statewide; (2) that patently offensive sexual conduct could encompass mere nudity, four letter "obscenities" or activ-

4. Such retroactive application of the *Miller* ruling was found "the functional equivalent of an *ex post facto* application of the law (which) the due process clause forbids" by the court in *United States* v. *Lang*, C.D. Cal., No. 10712-HP-CD, —— F.Supp.—— (July 18, 1973).

ity far removed from the "hard core" variety; and (3) that the issue of the value of the material could be determined in accordance with a *local* as opposed to a *national* standard. We believe that all of these assumptions are an incorrect reading of *Miller* and its companion cases and we urge this Court to take this appeal and clarify its earlier rulings accordingly.

1. The scope of the "community" which is to decide prurience and patent offensiveness must be no smaller than the State.

Miller, in its first guideline, asked "whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest."

The Georgia Supreme Court interpreted *Miller* to mean that "local" community standards rather than a statewide community standard, may be applied in determining prurient appeal or patent offensiveness. "The *Miller* case, *supra,* further held that juries can consider State or local community standards in lieu of 'national standards' • • •" the court below said.

Amici believe that interpretation to be incorrect. In reaching this conclusion the Georgia court may have relied upon the following language in *Miller*:

> "It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City." (—— U.S., at ——, 93 S.Ct., at 2619).

The reference to municipal as well as State entities naturally has been the source of much confusion. Despite the confusion resulting from the above-quoted language, we believe that this Court intended to set down new guidelines in *Miller* in order that all affected parties understand the standards by which "obscenity" would be judged. "We are satisfied," this Court declared, "that these specific prerequisites will provide fair notice to a dealer in such materials that his public and commercial activities may bring prosecution." (—— U.S., at ——, 93 S.Ct., at 2616-17).

That which at the time of the rulings appeared clearer than prior law to the majority of Justices in *Miller* has, however, engendered greater confusion among those affected by the decision. While *Amici* fear that replacement of a national standard by fifty State standards restricts First Amendment freedoms and poses severe practical hardships on disseminators of literary or artistic works, we believe that it was such a replacement which this Court adopted in *Miller*. We submit, however, that this Court must clarify that local counties, cities, towns and other local entities cannot set "community standards" and thereby create an incomprehensible patchwork of censorship which would affect the dissemination of protected works on the local and ultimately on the State and national levels because of the impracticalities of tailoring publication and distribution to an unlimited number of communities with varying standards.

We repeat the statement made in the brief submitted by several of the *Amici* in support of a petition for rehearing in *Kaplan*, that

> "The Amici presume that the Court did not intend to allow juries sitting in different counties within the

same State to judge the same or similar materials against varying standards. To allow such variation will amount to decisions being made in each case on the basis of the standards of the individuals on each jury. The consequence is, of course, no standard against which publishers, distributors and retailers can gauge materials even if they are familiar with the applicable State legislation."

If every county, city, town and village, not to mention neighborhood, in each of the fifty States is permitted to set its own local standards, even serious literary or artistic works will have difficulty finding publishers, distributors and retailers willing to risk a multiplicity of suits under potentially thousands of different local standards. We call the Court's attention to the practical problems that such standards create for the nation's publishers and distributors, who will incur economic hardship in operating on other than a national basis and who are simply unable, with respect to any particular work, to cater to and accommodate the endless variety of standards prevailing in the nation's countless local communities.[5] *Amici* do not believe that the Court's guidelines intend that the lowest common denominator control; yet, that is their effect.

We believe that the Court, in *Miller* v. *California*, intended that State standards control and we urge the Court that it grant the appeal to make that point clear.[6] In so

5. Members of some of the *Amici* have already encountered numerous instances of local censorship involving prohibitions against the sale and display of magazines such as "Cosmopolitan" that would be ludicrous were the implications less serious.

6. The *Miller* decision has also been construed to mandate State standards in Washington by the Supreme Court of Washington in *State* v. *J-R Distributors, Inc.*, 512 P. 2d 1049, 1065 (July 27, 1973).

doing, we urge that the Court make a definitive statement that the applicable community standards are no more local than those of the 50 States. Although the following statements in *Miller* have been misconstrued, we believe they do show that this Court intended that "local" standards be in fact *State* standards:

> "This Court has recognized that the *States* have a legitimate interest in prohibiting dissemination or exhibition of obscene material when the mode of dissemination carries with it a significant danger of offending the sensibilities of unwilling recipients or of exposure to juveniles. (citations omitted) It is in this context that we are called on to define the standards which must be used to identify obscene material that a *State* may regulate without infringing the First Amendment as applicable to the States through the Fourteenth Amendment." (Emphasis supplied.) (—— U.S., at ——, 93 S.Ct., at 2612)
>
> • • •
>
> "We conclude that neither the State's alleged failure to offer evidence of 'national standards,' nor the trial court's charge that the jury consider *state community standards,* were constitutional errors." (Emphasis supplied) (—— U.S., at ——, 93 S.Ct., at 2619)
>
> • • •
>
> "People in different *States* vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity." (Emphasis supplied.) (—— U.S., at ——, 93 S.Ct., at 2620)

Similarly, statements in *Paris Adult Theatre I* v. *Slaton*, —— U.S. ——, 93 S.Ct. 2628 (1973), have the same import but have proven no more enlightening to those enforcing or interpreting the law. In *Slaton*, for example, this Court stated that:

"The *states* have the power to make a * * * judgment that public exhibition of obscene material, or commerce in such material, has a tendency to injure the *community as a whole* * * *." (Emphasis supplied.) (—— U.S., at ——, 93 S.Ct., at 2641)

It is clear to *Amici*, from these illustrations and numerous others in *Miller* and its companion cases, that the Court intended that the community standards used to determine prurient appeal and patent offensiveness be no more local than that of the States. We respectfully request the Court to now affirm that holding.

2. The type of sexual content which is unprotected must be limited to patently offensive representations or descriptions of "hard core" sexual conduct.

The second prong of the *Miller* guidelines asks "whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law."

The Court explained that its aim was to bring under control "hard core" pornography. Thus, it clearly stated,

"Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct specifically defined by the regulating state law, as written or construed. We are satisfied that these specific prerequisites will provide fair notice to a dealer in such materials that his public and commercial activities may bring prosecution." (—— U.S., at ——, 93 S.Ct., at 2616-17)

Unfortunately, however, language in other parts of the decision have been used as a pretext to suppress works merely because they contain some sexual content—whether it be nudity or four letter words. Any sexual material appearing in "Carnal Knowledge" simply is not "hard core" sexual conduct. Moreover, as discussed in detail by appellant in the Jurisdictional Statement, there is a serious question whether Georgia's obscenity law does specifically define sexual conduct that may be proscribed if patently offensive and if the other tests of *Miller* are met.

Because the *Miller* decision requires that sexual conduct be "specifically defined by the regulating state law, as written or construed," many courts will be faced with the problem of construction with which the Georgia Supreme Court clearly wrestled.[7] The opinion below of the Georgia Supreme Court illuminates the dangers to due process resulting from the application of definitions from statutes dealing with such diverse subjects as "indecent exposure" and materials that may be deemed "harmful to minors". Definitions of sexual conduct in statutes dealing with indecent exposure or materials harmful to minors are manifestly inappropriate in defining "obscene materials" which "depict or describe patently 'hard core' sexual conduct," proscribed by the *Miller* decision as not falling within the ambit of protection afforded by the First Amendment. Incorporating such definitions either through judicial construction or in new legislation would clearly go beyond

7. This problem has already been encountered by judges considering the laws of New Jersey (*Hamar Theatres Inc.* v. *Cryan, supra*); New York (*Redlich* v. *Capri Cinema, supra*); Washington (*State* v. *J-R Distributors, Inc., supra*); District of Columbia (*United States* v. *Dorfman*, D. D.C., Crim. No. 181-73, —— F.Supp. ——, August 31, 1973) and California (*People* v. *Enskat*, 2nd Crim. No. 22506, —— P.2d —— (Ct. of App. Cal. 2d Dist. August 8, 1973) to name a few.

the intention and, we believe, the holding of the Court that only "hard core" sexual conduct which is patently offensive may be banned.[8]

In view of this Court's statement in *Miller* that its goal is to isolate and control hard core pornography, the *Amici* do not believe that the Court meant to abandon a basic premise of *Roth* v. *United States*, 354 U.S. 476 (1957) that "sex and obscenity are not synonymous."

In *Roth*, the Court specifically noted that:

> "Sex, a great and mysterious motive force in life has indisputably been a subject of absorbing interest to mankind throughout the ages; it is one of the vital problems of human interest and public concern." (354 U.S. at 487)

Indeed, the Court in *Miller* observed that "One can concede that the 'sexual revolution' of recent years may have had useful byproducts in striking layers of prudery from a subject long irrationally kept from needed ventilation." (—— U.S., at ——, 93 S.Ct., at 2621).

Although four Justices of this Court as well as *Amici* and others disagree, it is apparent that a majority of the Court believe it necessary and possible to draw the fine line dividing protected material from unprotected material. While the majority of this Court has stated that the line should cut off protection from "hard core" sexual conduct, the short experience with *Miller* since June 21, 1973 and,

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8. Indeed, application of the definitions in many of the States' laws dealing with material "harmful to minors" would violate the clear holding of this Court in *Butler* v. *Michigan*, 352 U.S. 380 (1957), that the reading material for adults should not be curtailed to what is fit for children.

indeed, the decision below itself shows that much wider interpretations have and are likely to prevail.[9]

This confusion seems to result from language in *Miller* itself. While the Court in *Miller* states that regulation must be confined to works which depict or describe "hard core sexual conduct", it gives examples that are potentially more encompassing;[10] it goes on to suggest that mere nudity may be proscribed:

> "Sex and nudity may not be exploited without limit by films or pictures exhibited or sold in places of public accommodation." (—— U.S., at ——, 93 S.Ct., at 2615-16)

It remains less than clear that a State cannot regulate materials which contain descriptions or representations of nudity—the human body in its natural state. And, indeed, the Georgia Supreme Court believed that it was constitutionally permissible to ban a film and convict an exhibitor because of some nudity, some four letter words and a sexual theme which, we submit, cannot be construed as present for the commercial exploitation of prurient appeal.

Amici respectfully urge the Court to clarify that regulation must be limited to hard core sexual conduct and not mere sexual content, language or depictions of the nude human body.

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9. The frequent *per curiam* reversals by this Court of state court decisions based on *Redrup* v. *New York*, 386 U.S. 767 (1967), illustrate that any ambiguity in this Court's decisions contain the seeds of abuse.

10. In fact, one judge found that *Miller* and its companion cases set forth different evidentiary requirements for materials which are "hard core pornography" than for materials which are "obscene" but not hard core pornography. See memorandum decision in *Maryland State Board of Motion Picture Censors* v. *Gallagher*, Circuit Court of Baltimore City, *per* Thomas, J. (July 11, 1973).

3. The standard for deciding whether a work has serious value must be a national standard.

In rejecting the "utterly without redeeming social value" test as a constitutional requirement in *Miller*, this Court has set forth as the third test "whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value." Although this test is presumably to be made in accordance with a national standard, nowhere in *Miller* is that governing standard specifically stated. Because of the emphasis in *Miller* on community standards with respect to prurient appeal and patent offensiveness, the court below incorrectly assumed that a community standard governed this determination as well.

To avoid continuing misconstruction, *Amici* submit that this Court should now clarify that the third prong of the *Miller* test requires—unlike the other two tests—the application of a national standard. Clearly, we submit, this was the Court's intention.

In *Miller* the Court said:

> "The First Amendment protects works which, taken as a whole, have serious literary, artistic, political or scientific value, regardless of whether the government or a majority of the people approve of the ideas these works represent. 'The protection given speech and press was fashioned to assure unfettered interchange of *ideas* for the bringing about of political and social changes desired by the people." (—— U.S., at ——, 93 S.Ct., at 2620-21).

The First Amendment protection of works which taken as a whole have serious value, "regardless of whether the

government or majority of the people approve of the ideas these works represent," cannot be taken away by a community which applies its own standards of literary or artistic value. The literary or artistic merit of a movie or book and the existence of ideas therein presented are not subjects for determination by "community standards." Moreover, a movie or book which has serious literary or artistic value is, under the guidelines of *Miller*, still entitled to First Amendment protection, even where—unlike the case at bar—it appeals to the prurient interest and is patently offensive.

Nevertheless, as obvious as these matters may appear to *Amici* and to this Court, misinterpretations made by others, including the court below, indicate the need for clarification of the "serious value" standard.

Indeed, besides making clear that "serious value" is to be determined by a national standard, detached from the issues of prurient appeal and patent offensiveness, *Amici* submit that the Court should grant this appeal to reaffirm its earlier holding that entertainment and "value" are not mutually exclusive. As this Court has recognized, the fact that a movie or a book may also be designed to entertain makes it no less subject to such protection. As Justice Clark observed in *Burstyn* v. *Wilson*, 343 U.S. 495, 501 (1952), the entertainment and commercial values of motion pictures make them no less

> "a significant medium for the communication of ideas. They may affect public attitude and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression.

> The importance of motion pictures as an organ of public opinion is not lessened by the fact that they are designed to entertain as well as to inform * * *."

Simply because the third prong of *Miller* sets forth four specific types of value, *Amici* do not believe this Court meant to deny protection to works with value in other areas such as philosophy, education and entertainment.

Finally, with respect to the third prong of the *Miller* test, this Court should clarify that it is not the role of, nor is it even possible for, the average juror, or a judge without a jury, to determine value on a national standard based solely on his or her assessment of the materials. That determination must be based not on personal subjective considerations, but on the opinions of critics, scholars and other literary experts. *Amici* submits that the Court below erred in failing to consider the national critical acclaim given to "Carnal Knowledge" the film here in issue.

Absent such clarification, decisions such as the one at bar will recur. The critical acclaim to which "Carnal Knowledge" has been received as briefly indicated in the dissenting opinion of Justice Gunter below, and the list of its credits—produced and directed by Mike Nichols, adapted for the screen play by Jules Feiffer and staring Jack Nicholson, Ann-Margret and other actors of similar high quality and renown—in and of themselves indicate the lower court's error in holding that the film lacks serious value.

But, as the minority opinion of Justice Gunter indicates, the four members of the majority below substituted their

personal evaluation of the film's literary and artistic value. "[M]aterial is pornographic and unprotected in the subjective mind and senses of one judge;" Gunter, J., said, "and the same material has serious literary or artistic value in the subjective mind and senses of another judge."

In view of the widespread misunderstanding of the "serious value" test it is respectfully submitted that the Court should make clear that a national standard, unlinked to the issues of prurient appeal and patent offensiveness and based on the evaluations of critics, scholars and other literary experts, is the only proper standard to apply; that "serious value" is a judgment of quality, not popularity, and as such is not subject to determination by majority vote based on personal taste.

POINT II

Confusion resulting from *Miller* and earlier efforts to define the perameters of constitutional protection instruct that due process requirements be clarified.

1. The problem of defining obscenity with sufficient clarity has not been solved.

In light of the inherent and now apparent confusion resulting from the vague guidelines of *Miller* and related cases as set forth above, *Amici* believe that the need for clarification is urgent. Nevertheless, the tortured history of this Court's obscenity decisions, as recognized by all of the Justices, convinces us that no effort at clarification or specificity can reconcile suppression of sexually related material with the fundamental principles of the First Amendment.

The *Amici*, therefore persuaded that only the approach adopted by the minority of the Court in *Slaton, supra*, will satisfy First Amendment commands, urge this Court to reevaluate the threshold issue—the possibility of "reconciling state efforts to suppress sexually oriented expression with the protections of the First Amendment, as applied to the States through the Fourteenth Amendment." *Paris Adult Theatre I* v. *Slaton, supra*, —— U.S., at ——, 93 S.Ct., at 2642 (Brennan, J., joined by Stewart, J., and Marshall, J., dissenting). Accordingly, *Amici* respectfully suggest, for the reasons set forth in Mr. Justice Brennan's *Slaton* opinion and in *Amici's* brief in support of a petition for rehearing in *Kaplan*, that the limits of obscenity regulation be permitted to extend no further than well-defined efforts to avoid exposure to minors and intrusion of the privacy and sensibility of adults offended by pandering and commercial promotion.

The "Carnal Knowledge" prosecution and similar experiences, both before and after *Miller*, involving works of serious literary and artistic value support the minority in sounding the "alarm of repression" and being unconvinced by the Court's statement in *Miller* that

> "the First Amendment values applicable to the States through the Fourteenth Amendment are adequately protected by the ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary." (—— U.S., at ——, 93 S.Ct., at 2615).

The inadequacy of independent appellate review in safeguarding First Amendment values was noted by Justice Gunter in his dissenting opinion below, stating:

> "My experience with this one case teaches me that the 'alarm of repression' was validly sounded; it also

> teaches me that the *Miller* majority's assumption, that courts can distinguish commerce in ideas that is protected from commercial exploitation of obscene material that is not protected, is a too optimistic assumption. The instant case is the proof that is in the pudding; material is pornographic and unprotected in the subjective mind and senses of one judge; and that same material has serious literary or artistic value in the subjective mind and senses of another judge * * *."

Because of the inability to define and isolate obscene materials, protected materials will continue to be threatened and banned and this Court will simply resume the role it fulfilled under *Redrup, supra*—a role it has sought to avoid.

Amici, therefore, urge the Court to adopt Mr. Justice Brennan's position in *Slaton*, that

> "in the absence of distribution to juveniles or obtrusive exposure to unconsenting adults, the First and Fourteenth Amendments prohibit the state and federal governments from attempting wholly to suppress sexually oriented materials on the basis of their allegedly 'obscene' contents." (—— U.S., at ——, 93 S.Ct., at 2662).

2. A prior civil determination of obscenity should be constitutionally mandatory as the only means to provide fair notice.

If this Court is not prepared to adopt the position set forth above, a position which, we submit, does balance the interests of the States with constitutional requirements, it should at least provide those who create, publish, produce and disseminate material subject to legal guidelines which always are subject to varying interpretation, with protection from the hazards and risks of criminal prosecutions.

This Court has expressed its preference for a procedure under which a civil proceeding determining obscenity precedes any criminal prosecution. Mr. Chief Justice Burger observed in *Slaton* that

> "such a procedure provides an exhibitor or purveyor of materials the best possible notice, prior to any criminal indictments, as to whether the materials are unprotected by the First Amendment and subject to state regulation." (—— U.S., at ——, 93 S.Ct., at 2634).

He added that such

> "procedure would have even more merit if the exhibitor or purveyor could also test the issue of obscenity in a similar civil action, prior to any exposure to criminal penalty." (—— U.S., at ——, 93 S.Ct., at 2634 n.4).

In view of the arguments set forth above, *Amici* respectfully submit that this Court should hold such procedure not only preferable to direct institution of criminal prosecutions, but constitutionally required.

The arrest, prosecution, and conviction of Billy Jenkins for exhibiting "Carnal Knowledge" a film, not only accepted but acclaimed throughout the nation, should be a lesson in the impossibility of predicting what will be found "obscene" and in the failure of even "specific prerequisites" to "provide fair notice to a dealer in such materials that his public and commercial activities may bring prosecution." (—— U.S., at ——, 93 S.Ct., at 2616-17).[11]

11. *Amici* believe that the "cruel and unusual punishment" reasoning adopted by the Court in *Furman* v. *Georgia*, 408 U.S. 238 (1972), is equally applicable where a distributor or exhibitor is subject to the uncertain and arbitrary risk of criminal prosecution prior to any civil proceeding determining obscenity.

The Commission on Obscenity and Pornography, advocating a prior civil determination of obscenity, has argued:

> "the criminal process should not ordinarily be invoked against persons who might have reasonably believed, in good faith, that the books or films they distributed were entitled to constitutional protection, for any threat of criminal sanctions might otherwise deter the free distribution of constitutionally protected material." Report of the Commission on Obscenity and Pornography 71 (1970).

Using somewhat stronger language, Mr. Justice Douglas reached the same conclusion in *Miller*. He stated:

> "If a specific book, play, paper or motion picture has in a civil proceeding been condemned as obscene and review of that finding has been completed, and thereafter a person publishes, shows or displays that particular book or film, then a vague law has been made specific. There would remain the underlying question whether the First Amendment allows an implied exception in the case of obscenity. I do not think it does and my views on the issue have been stated over and again. But at least a criminal prosecution brought at the juncture would not violate the time-honored void-for-vagueness test."
>
> "* * * To send men to jail for violating standards they cannot understand, construe, and apply is a monstrous thing to do in a Nation dedicated to fair trials and due process." (—— U.S., at ——, 93 S.Ct., at 2624-25).

Amici believe that the requirement of a prior civil determination of obscenity will permit states to exercise effective control of unprotected material without needlessly and unjustly victimizing booksellers and motion picture

exhibitors with the threat or actual imposition of criminal penalty and its heavy financial burdens and unfair toll on reputation. We believe that such a requirement is necessary to protect against the chilling effects of grass-roots censorship and of self-censorship on controversial but constitutionally protected material.

A bald criminal statute, even if aimed only at the panderer of hard-core pornography, in the hands of a prosecutor, either on his own initiative or under pressure from vocal minorities, could subject the local librarian, the man who runs the neighborhood movie theatre, the corner bookstore clerk or even the druggist who carries paperbacks in his store to the same criminal sanctions and personal humiliations as the pornographer. The perpetual threat of prosecution imposes an intolerable burden on their right and responsibility to make a broad selection of constitutionally protected materials available to the people of this Nation.

Conclusion

In view of the foregoing, *Amici* respectfully request that this Court grant the appeal, reverse the conviction and set forth clear substantive and procedural requirements to prevent further infringements of constitutional rights.

Respectfully submitted,

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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-857

BILLY JENKINS,

Appellant,

v.

STATE OF GEORGIA,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF GEORGIA

BRIEF OF THE AUTHORS LEAGUE OF AMERICA, INC. AS AMICUS *CURIAE* IN SUPPORT OF APPELLANT'S JURISDICTIONAL STATEMENT

IRWIN KARP
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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-557

BILLY JENKINS,

Appellant,

v.

STATE OF GEORGIA,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF GEORGIA

Motion for Leave to File Brief As *Amicus Curiae*

The Authors League of America respectfully petitions the Court for leave to file the annexed brief *amicus curiae*. The League is a national society of professional authors and dramatists. Many of its members write screenplays; and many books and plays by its members are adapted for the screen. The author of the screenplay for the film CARNAL KNOWLEDGE, Jules Feiffer, is a member of the Authors League, and a distinguished writer and artist. One of the principal purposes of the Authors League is to express the views of its members in cases involving freedom of speech and press; and the freedom to read books and view films and plays. The decision of the Supreme Court of Georgia drastically curtails these freedoms, and restricts the constitutional rights of authors, screenwriters, direc-

tors and film producers. It is particularly important that the Court review that decision because it misapplies the guidelines announced in *Miller* v. *California* in two fundamental respects. Allowed to stand, the Georgia decision will result in the suppression of many films of literary and artistic value which are entitled to First Amendment protection.

Therefore, the Authors League respectfully seeks the Court's permission to file the annexed brief *amicus curiae*. The attorneys for the Appellant have consented to the filing of this brief. The attorneys for the appellee have refused, in response to the League's request, to consent to its filing.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-557

BILLY JENKINS,

Appellant,

v.

STATE OF GEORGIA,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF GEORGIA

BRIEF OF THE AUTHORS LEAGUE OF AMERICA AS *AMICUS CURIAE*

Interest of The Authors League

The Authors League is a national society of professional writers and dramatists. Several of them write screenplays; and many books and plays by its members are adapted for motion pictures. One of the League's principal purposes is to express the views of its members in cases involving freedom of speech and press, and the freedoms to read books and view plays and films. The decision of the Supreme Court of Georgia drastically curtails these freedoms, and restricts the constitutional rights of authors, screenwriters, directors and film producers.

Summary of Argument

I. The serious literary or artistic value of a work cannot be judged by community standards. CARNAL KNOWLEDGE is such a work, having been evaluated by professional critics as a genuine effort at literary and artistic expression. A work which receives such recognition has sufficient "value" to entitle it to First Amendment protection regardless of its alleged prurient interest or patent offensiveness.

II. The Court must prevent censorship by uncertainty. Prior civil determinations of obscenity should be required. The meaning of "serious literary or artistic value" must be clarified to prevent any prosecution of films like CARNAL KNOWLEDGE which clearly possess such values. The most effective guidance, and meaningful First Amendment protection, can be provided under the "willing adult" standard proposed by Justices Brennan, Stewart and Marshall.

III. "Local" standards for determining prurient interest or patent offensiveness cannot be applied under *Miller* v. *California*.

Preliminary Statement

We agree with Appellant that Sec. 26-2105 (Ga. Code Ann.), which prohibits the exhibition of films that contain acts that would be "public indecency" under Sec. 26-2011, is unconstitutional on its face, and as applied to CARNAL KNOWLEDGE, and as construed by the Supreme Court of Georgia. We also agree that Appellant was denied due process; *inter alia*, because he was not charged with two offenses on which his conviction may have rested.

In this brief, we address ourselves to the remaining issues: (I) Whether CARNAL KNOWLEDGE is constitution-

ally protected under the *Miller* v. *California* guidelines; and under the *pre-Miller* standards of the Georgia statute, and this Court; (II) Whether the *Miller* guidelines permit censorship by uncertainty; and (III) Whether prurient interest and patent offensiveness can be judged by "local" community standards.

POINT I

As a work of serious literary and artistic value (and therefore of redeeming social value) CARNAL KNOWLEDGE cannot be adjudged obscene.

CARNAL KNOWLEDGE does not appeal to prurient interest and is not patently offensive in depicting sexual conduct. But the right of adults to see the film in Albany County, Georgia, does not depend on an analysis of these first two elements of the *Miller* guidelines. CARNAL KNOWLEDGE is entitled to First Amendment protection in Albany County and throughout the United States because it is a work of serious literary and artistic value. It therefore satisfies the "minimum" which entitles even prurient, patently offensive works to "merit First Amendment protection" under *Miller* v. *California*. 41 LW 4928. And because it has these values, it is also entitled to protection under the "redeeming social value" test of the Georgia obscenity law.

Under *Miller*, the serious literary or artistic value of a work is not to be judged by "community standards", local or state. An Albany county jury might determine that LADY CHATTERLY'S LOVER or ULYSSES were prurient, patently offensive works, lacking serious literary or artistic value—and the Supreme Court of Georgia might affirm that result. But certainly this Court would reverse the

conviction under *Miller* since both novels are works of "serious" literary and artistic value; although scholars and critics may differ as to the degree of "value", some hailing the novels, others believing they are considerably less than masterpieces. Both have such value because they are genuine ("serious") literary or artistic "expressions". (41 LW at p. 4927); they cannot be dismissed as hardcore pornography seeking redemption with "A quotation from Voltaire in the flyleaf . . ." (41 LW at 4928 n. 7). The motion picture is an art form no less complex or sophisticated than literature, the stage or painting. Twelve jurors bring no greater aesthetic expertise to CARNAL KNOWLEDGE than they would to ULYSSES, WAITING FOR GODOT or LES DEMOISELLES D'AVIGNON. And under the First Amendment these works would still have serious literary and artistic value in Maine, Mississippi and Georgia even if juries in Bangor, Biloxi or Albany ruled to the contrary.

CARNAL KNOWLEDGE is a work of serious literary and artistic value:

> "Not only is the film, overall, the best acted in years; it is also the most mature of all those American films that have attempted to deal with the subject of sex in these ultra-liberated cinematic times." SATURDAY REVIEW (Hollis Alpert); July 3, 1971, p. 18.
>
> "Obviously, the film is not for everyone, but it struck me as Nichols' most controlled piece of direction, bringing a mature perspective to a funny, bitter deeply probing examination of immature behavior." AMERICA ("Published by Jesuits of the United States and Canada") July, 1971, p. 48.

These are two of the fourteen national magazine reviews of CARNAL KNOWLEDGE indexed by READERS GUIDE TO PERIODICAL LITERATURE for March 1971-February 1972. (p. 764) Some critics agreed with Mr. Alpert's highly favorable judgment; as Appellant's brief notes, the film appeared on the "10 Best Films" lists of several reviewers. Other reviewers were less favorably impressed; Paul D. Zimmerman's review in NEWSWEEK concludes "what might have been a great film survives simply as a very good one." July 5, 1971; p. 71. What is significant is that all of the reviewers considered, and evaluated, CARNAL KNOWLEDGE as a film of serious literary and artistic value. They considered it a genuine effort at literary and artistic expression, regardless of their differing evaluations of its success in realizing its aesthetic objectives. These reviews, and others in newspapers across the country, reflect Judge Hawes' view that "Certainly (CARNAL KNOWLEDGE) is not the kind of hard-core pornography we removed from public consumption in *Slaton* v. *Paris Adult Theater I*."

We do not contend that professional critics are infallible arbiters of literary or artistic value. Sometimes they have failed to perceive these values in works whose merits were later widely hailed. And we do not believe that any work should be convicted of obscenity on the basis of critics' reviews. But there is a strong presumption in favor of First Amendment protection for books, films and other works. Consequently, when recognized, professional critics—in their reviews—consider that a film or book is a genuine work of literary or artistic expression then, we submit, it has sufficient "value" to entitle it to First Amendment protection under the third Miller guideline (and therefore, under Georgia's "redeeming social value" test). We believe

that the view of even a minority of such critics is sufficient to establish that "value" for First Amendment purposes.

At the very minimum, these spontaneous, unsolicited evaluations by some professional critics should create a presumption of "value" which appellate courts must explicitly and convincingly overcome when they deny First Amendment protection to a book or film. Here, the majority of the Georgia Supreme Court ignored the views of professional critics, called to its attention in Justice Gunther's dissenting opinion. The majority made no attempt to explain or support its subjective conclusion that CARNAL KNOWLEDGE was "obscene". It also ignored the fact that 43% of the Court made "an independent constitutional judgment on the facts of the case"* that CARNAL KNOWLEDGE was not obscene. Had that proportion of the jury reached the same conclusion, there would not have been a conviction.

POINT II

The Court must prevent censorship by uncertainty.

Here, Billy Jenkins was convicted and sentenced for making the same judgment reached by three justices—43%—of Georgia's highest court. He thought CARNAL KNOWLEDGE was not "obscene". But his failure to correctly predict how a jury would evaluate the film, and its literary and artistic value, subjects him to serious penalties. Most theatre owners cannot risk predicting whether controversial films will be ruled obscene, after they have exhibited them. Aside from the risks of jail and fine, they cannot afford the heavy financial burdens of a prosecution or appeal even if they ulti-

* *Jacobobellis* v. *Ohio*, 378 U.S. 184, 190.

mately prevail. Consequently many theatre owners will not exhibit non-obscene films that are controversial, and can be coerced by threats of prosecution into rejecting films of serious literary and artistic value that are entitled to protection under the *Miller* guidelines.

Motion picture producers, in turn, cannot risk substantial investments in film that will be barred from exhibition in many parts of the country by such self-censorship and grass-roots censorship. Consequently authors and directors are prevented from creating works of genuine literary and artistic value; and adults who choose to see such works are denied the right to view them.

As we have advised the Court, in an *amicus curiae* brief filed in *Kirkpatrick & Dargis* v. *People of the State of New York* (No. 73-104), the Authors League believes that one safeguard needed to prevent wide-spread suppression of non-obscene books and films is the requirement of a prior civil adjudication that a work is obscene, before a theatre owner, book seller or librarian can be criminally prosecuted for exhibiting or distributing it.

Furthermore, we believe that this Court must require adequate guidance to theatre owners and booksellers who are obliged to apply the *Miller* standards. No theatre owner in Georgia could determine, from the CARNAL KNOWLEDGE decision what elements of the film impelled 4 justices to reach the astounding conclusion that the film as a whole was prurient, that it was patently offensive, and—most astounding of all—that it lacked serious literary or artistic value. Thus no theatre owner could determine whether the next film challenged by local prosecutors would suffer the same fate at the hands of the Georgia court's majority. And few

can afford to risk finding out. The uncertainty produces a most effective tool of censorship—against theatre owners, motion picture producers and adult audiences.

Certainly the majority opinion of the Georgia Supreme Court indicates the urgent need for this Court to provide further guidance to state courts and prosecutors on the subject of serious literary and artistic value. The meaning of the term should be made clear enough to dissuade them from permitting any prosecution of a film such as CARNAL KNOWLEDGE which obviously possesses these values. If they cannot do this, the *Miller* guidelines inevitably will permit the erosion of First Amendment rights through the process of self-censorship and grass-roots censorship described above, and in our *amicus curiae* brief in *Kirkpatrick & Dargis* v. *The State of New York*.

The most effective method of providing adequate guidance, and meaningful First Amendment protection is stated in Justice Brennan's opinion in *Paris Adult Theater I* v. *Slaton*, (41 LW at 4955). If a theatre owner had any doubts about a film's status under a statute protecting juveniles, he would prevent them from entering the theatre (as is now done). If he had any doubts about a film's status under a "thrusting" statute, he would avoid advertising or displays that might intrude offensive materials on unwilling adults. But he could not be prevented, by threats of prosecution (or self-censorship born of uncertainty), from exhibiting films of literary and artistic value to adults who chose to see them—for the exhibition of a film, "obscene" or not, to adults willing to see it could never be prosecuted as a crime.

POINT III

"Local" community standards cannot be applied under the *Miller* standard.

The majority opinion of the Georgia Supreme Court construes *Miller* v. *California* as permitting the application of local, as distinguished from state, community standards in determining whether a work appeals to prurient interest, or is patently offensive in its depiction of sexual conduct. We believe that this Court sanctioned only the application of state-wide community standards. [*e.g.*, in its preamble to the statement of the guidelines, this Court stressed the need to carefully limit "state statutes"; to define proscribed conduct by "the applicable state law", and to limit a "state offense" to works failing the three tests of the *Miller* standard. (41 LW 4927).]

There are thousands of local communities in the United States. If a work's alleged prurient interest or patent offensiveness can be judged separately under the "standard" of each community in which it is distributed, producers and publishers would be compelled to eschew non-obscene books and films likely to arouse any opposition because of sexual themes. They could not afford to risk the loss of several markets, or the cost of defending the many prosecutions that could be instituted or threatened under such a crazy-quilt system of local censorship. We respectfully urge the Court to make it clear on this appeal that only state-wide community standards can be applied under *Miller* v. *California*.

CONCLUSION

It is respectfully submitted that Probable Jurisdiction should be noted.

Respectfully submitted,

IRWIN KARP
Attorney for The Authors League of America, Inc. as Amicus Curiae

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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-557

BILLY JENKINS,

Appellant,

v.

STATE OF GEORGIA,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF GEORGIA

MOTION OF THE NATIONAL ASSOCIATION OF THEATRE OWNERS TO FILE A BRIEF IN SUPPORT OF APPELLANT'S JURISDICTIONAL STATEMENT AND BRIEF *AMICUS CURIAE*

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RULE:

Supreme Court Rule 42 iii

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-557

BILLY JENKINS,

Appellant,

v.

STATE OF GEORGIA,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF GEORGIA

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

The National Association of Theatre Owners (hereinafter "NATO") hereby moves for leave to file the annexed brief *amicus curiae*, pursuant to Rule 42 of the Supreme Court of the United States, in support of the Jurisdictional Statement filed by Appellant herein. The attorneys for the Appellant have consented to the filing of this brief; the attorneys for the Appellee have not responded to our request for such consent.

NATO is a trade association which represents the interests of motion picture theatres throughout the United States. It has a membership of over 8,000 theatres (repre-

senting a capital investment of over $5 billion) located in cities, suburbs, small towns and rural areas across the country. Its members include large "downtown" theatres, neighborhood theatres, shopping center theatres, drive-in theatres and multi-screen theatres, and the motion pictures they show represent an immensely important medium of artistic, cultural, political and social expression, as well as entertainment, for untold millions of American movie-goers.

NATO and its members are vitally interested in this appeal, which, unfortunately, involves a not atypical example of how this Court's rulings in *Miller* v. *California*, — U.S. —, 41 U.S.L.W. 4925 (June 21, 1973) and *Paris Adult Theatre I* v. *Slaton*, — *U.S.* —, 41 U.S.L.W 4935 (June 21, 1973), are being misapplied to strike at the very heart of the First Amendment rights of theatre owners to show films of serious artistic worth, regardless of how controversial they may be.

The Appellant-theatre owner in this case was convicted under a state criminal statute, not for displaying "hard core" pornography, but for showing one of the most critically acclaimed motion pictures of recent years, which had previously played "in the major cities of the nation, the major cities in Georgia, and in many of the cities and towns in Georgia without any contention being publicly made that it was obscene-pornographic".[1] Clearly, if a motion picture such as "Carnal Knowledge" is deemed "obscene" and therefore beyond the pale of constitutional protection, then all of NATO's members, as well as all other theatre owners in the United States, face a real threat of criminal prosecution whenever they show any film that could conceivably be found objectionable by some local prosecutor and jury. Indeed, the gravity of this danger grows each day as the pattern of local prosecution and harassment

[1] Dissenting opinion of Justice Gunter in the Georgia Supreme Court, at p. 8 of the Appendix to Appellant's Jurisdictional Statement (hereinafter "Appendix, p. .")

that has followed *Miller* becomes increasingly pronounced. Thus, the decision of the Georgia Supreme Court in this case serves to chill—if not freeze—the exercise of First Amendment rights of expression so far as this nation's theatre owners are concerned. The result, in our submission, can only be to lower the quality and diversity of the motion pictures shown across the country and seriously impair one of our most popular and available forums for the free interchange of ideas.

In view of the foregoing, NATO seeks the Court's permission to file the annexed brief and urges the Court to give plenary consideration to the appeal, to reverse the decision of the Georgia Supreme Court, and to take this opportunity to elucidate the *Miller* standards to make clear that pictures such as "Carnal Knowledge" which are not "hard core" pornography are protected by the First Amendment.

Respectfully submitted,

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.....
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IN THE

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October Term, 1973

BILLY JENKINS,

Appellant,

v.

STATE OF GEORGIA,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF GEORGIA

BRIEF OF NATIONAL ASSOCIATION OF THEATRE OWNERS AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT'S JURISDICTIONAL STATEMENT

As set forth in the foregoing motion, the National Association of Theatre Owners (hereinafter "NATO") is a trade association representing theatre owners throughout the United States. Its members are being prosecuted and harassed for showing motion pictures which we believe are clearly protected by the First Amendment and cannot by any stretch of the imagination be considered "hard core" pornography. If the decision on appeal from the Supreme Court of Georgia is not reversed, there will inevitably be a substantial increase in this prosecution and harassment, with a consequent restraining effect on First Amendment rights of speech and expression.

Preliminary Statement

Appellant has raised in his Jurisdictional Statement a number of issues concerning the interpretation of the relevant Georgia statutes and the particular procedures followed in the trial court. While NATO agrees that Appellant's position on these points is correct and that the errors referred to warrant reversal of the Georgia Supreme Court's decision, it does not believe that a reversal based on such narrow grounds will be of general significance nor suffice to alleviate the chilling effect on First Amendment rights that is rapidly developing in the movie industry today. NATO therefore urges the Court to limit plenary consideration of this appeal to the following issues which are of national concern and vital constitutional significance:

1. Whether the First Amendment as interpreted by *Miller* v. *California*, — U.S. —, 41 U.S.L.W. 4925 (June 21, 1973) protects from prosecution all motion pictures and other forms of speech and expression except material which is patently and obviously "hard core" pornography, and whether the film "Carnal Knowledge" is such "hard core" pornography so that it is outside the First Amendment's protection? (Point I)

2. Whether this Court in *Miller* meant to authorize the literally hundreds of thousands of local cities, towns, counties and villages throughout this country to apply their individual standards in adjudicating whether a motion picture appeals to the prurient interest, is patently offensive or lacks serious value? (Point II)

These two issues are squarely before the Court on this appeal. The Georgia Supreme Court specifically held, over the vigorous dissent of three of its seven justices, (i) that the film "Carnal Knowledge" is obscene and not protected by the First Amendment, and (ii) that the trial court was correct in instructing the jury to apply a local rather than a state-wide standard for determining the issue of obscenity.

POINT I

A motion picture such as "Carnal Knowledge," which is not patent and obvious "hard core" pornography, is protected by the First Amendment.

The Chief Justice's opinion for the Court in *Miller* states:

> "Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe *patently offensive 'hard core'* sexual conduct specifically defined by the regulating state law, as written or construed." 41 U.S.L.W. at 4928 (emphasis added).

Indeed, the *Miller* opinion specifically purports to set forth "concrete guidelines to isolate *'hard core'* pornography from expression protected by the First Amendment." 41 U.S.L.W. at 4929 (emphasis added). Additional references to "hard core" pornography appear throughout the decision.[1] Furthermore, the Court in *Miller* expressly adhered to the basic principles of *Roth* v. *United States*, 354 U.S. 476 (1957), that "ideas having even the slightest redeeming social importance" have the full protection of the First Amendment, and that obscenity is not protected by the First Amendment precisely because it is "no essential part of any exposition of ideas." 354 U.S. at 484-485, quoted in *Miller*, 41 U.S.L.W. at 4926. In short, while the Court sought to establish a constitutional standard under which patent and obvious "hard core" pornography could be outlawed by the states, it plainly did not intend to limit the scope of First Amendment protection for motion pictures that do not fall within this category.

It is thus plain that this Court never intended *Miller* to be used as a springboard for prosecuting a film such as

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[1] *See, e.g.*, 41 U.S.L.W. at 4928, 4929, 4931.

"Carnal Knowledge" that is obviously not "hard core" pornography—that, on the contrary, has been the subject not only of wide-spread critical acclaim, but also of critical commentary and debate with respect to the ideas, characters and view of the human predicament that it presents.

The difficult problem, of course, as this Court has long recognized, is to articulate on paper a standard which makes this basic division between protected and unprotected speech reasonably clear to prosecutors, judges and individuals conscientiously trying to obey the law. Unfortunately, the Georgia Supreme Court's decision below and the recent actions of prosecutors in other parts of the country in harassing pictures such as "Last Tango in Paris"[2] make it apparent that *Miller* was not successful in clarifying this all-important line.

We therefore urge that the Court in adjudicating this appeal should specifically hold as a matter of constitutional fact that the film "Carnal Knowledge" is not obscene because it is not patent and obvious "hard core" pornography.[3] Furthermore, the Court should make clear that

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[2] *See, e.g., United Artists Corporation* v. *Harris,* Civil No. CIV-73-498-D (W.D. Okla., filed July 24, 1973) and *United Artists Corporation* v. *Proskin,* Civ. No. 73-CIV-315 (N.D.N.Y., filed July 16, 1973) in which threats of prosecution resulted in termination of exhibition of "Last Tango in Paris." *See also Incorporated Village of Lynbrook* v. *United Artists Corp.* (New York Supreme Court, Nassau County, Special Term, Part I, Index No. 11383/73), in which further exhibition of "Last Tango in Paris" is sought to be enjoined.

[3] It is, of course, squarely within this Court's province to determine for itself whether "Carnal Knowledge" is in fact obscene under the relevant constitutional standards since "the duty rests on this Court to decide for itself facts or constructions upon which Federal Constitutional issues rest." *Kern-Limerick, Inc.* v. *Scurlock,* 347 U.S. 110, 121 (1954). *See also Jacobellis* v. *Ohio,* 378 U.S. 184 (1964); *Napue* v. *Illinois,* 360 U.S. 264 (1959); *Niemotko* v. *Maryland,* 340 U.S. 268 (1951).

only such "hard core" pornography—smut for smut's sake, if you will—forfeits First Amendment protection. We respectfully suggest that such an explicit statement by this Court, that films that are not patent and obvious "hard core" pornography cannot be prosecuted, would go a long way toward clarifying the rather nebulous standard enunciated in *Miller* and removing a significant cloud that presently serves to inhibit freedom of expression in the motion picture industry.

POINT II

Under *Miller* v. *California*, state-wide "community" standards should be applied to determine prurience and patent offensiveness, and a national standard should be used to determine serious value.

In *Miller*, the California courts had used the "contemporary standards of the State of California" to adjudicate the prurience and patent offensiveness of the material in question, and this Court thus specifically upheld the use of a state-wide standard with respect to these criteria. Nevertheless, there has been much confusion following *Miller* as to whether state courts and legislatures must apply state standards or can instead allow the myriad communities within a state to apply their own local standards.[4] In the instant case, the Supreme Court of Georgia applied its own "local" community standard test,[5] with

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[4] *Compare e.g.*, *State* v. *J-R Distributors, Inc.*, 512 P.2d 1049, 1065 (Wash. 1973) (state-wide standard required) *with Rhodes* v. *State*, — So. 2d — (S. Ct. of Fla., Case No. 41,416, September 19, 1973) (local standards applied).

[5] The trial judge instructed the jury to apply a "community standard" (R. 5, 66) and the Georgia Supreme Court clearly understood this to refer to the local community in Dougherty County, Georgia rather than the state as a whole. Thus Justice Jordan's majority opinion interpreted *Miller* as authorizing *"state or local*

the anomalous result that "Carnal Knowledge" has been found obscene by the local standard of Dougherty County, although it has been shown—with apparent constitutional protection—in many other Georgia towns and cities.[6]

It takes no great prescience to realize that such balkanized application of the United States Constitution must inevitably destroy any pretense of a fair and uniform system of criminal justice. Furthermore, from the standpoint of NATO and its members, it makes it totally impossible for a theatre owner to have any way of knowing whether the exhibition of a particular motion picture constitutes a protected expression of his First Amendment rights or the commission of a crime. Indeed, he does not even have any advance knowledge as to whether the relevant community standard will be that of a county, a city, town or village, or even a section or neighborhood within one of these units. The 14,000 motion picture theatres in the United States are located within many thousands of different political subdivisions. An impossible crazy-quilt will result if each of these units is to apply its own standards so that films are outlawed in some places and constitutionally protected in adjoining places within the same state. Thus with respect to prurience and patent offensiveness, we respectfully urge the Court to make clear on this appeal that only state-wide standards can be applied under *Miller*.

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community standards in lieu of 'national standards'" (Appendix, p. 3) (emphasis added). This shows that the Georgia Court considered a "local" standard to encompass a smaller area than a "state" standard. Furthermore, Justice Gunter's dissent states that the majority was referring to "this 'local community'" as meaning Dougherty County (Appendix p. 5), and Justice Hawes' dissent specifically points out that the majority approved "small towns and hamlets as being the 'community' from which the standard for obscenity is drawn . . ." (Appendix, p. 16).

[6] *See* Justice Gunter's dissent, Appendix, p. 8.

The Georgia Supreme Court further applied local community standards in passing upon the issue of whether "Carnal Knowledge" possesses serious value as a motion picture. *See* Appendix, p. 3. Here, the Dougherty County jury utilized the stricter pre-*Miller* test provided by the Georgia statute and found that this Academy Award winning film—one of the "10 Best" pictures of 1971— was not merely lacking in serious artistic value "taken as a whole",[7] but indeed was "utterly without redeeming social value". Appendix, p. 3.

In *Miller*, this Court sanctioned the use of community (i.e., state-wide) standards only with respect to the issues of whether allegedly obscene material appeals to the "prurient interest" or is "patently offensive". 41 U.S.L.W. at 4929. It plainly did not suggest that anything less than a national standard may be used to judge serious value. A tolerance for offensiveness may indeed vary from Maine to New York or from Mississippi to Nevada; but a book such as *Ulysses* does not cease to be a treasured classic of our civilization simply because it is carried across a state line, and a film such as "Carnal Knowledge" is not emptied of its nationally-recognized artistic merit by virtue of being shown in Dougherty County, Georgia.

The verdict of the Dougherty County jury plainly shows that the effect of applying *any* parochial standard of artistic worth is to vitiate totally the constitutional safeguard articulated in *Miller* that no work may be stripped of its First Amendment protection unless, "taken as a whole, [it] lacks serious literary, artistic, political, or scientific value". 41 U.S.L.W. at 4928. Again, unless this aspect of *Miller* is clarified, we will continue to see a distressing growth of local "obscenity" suits aimed incongruously at the best products of the American motion picture industry.

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[7] See *Miller* v. *California*, 41 U.S.L.W. 4925, 4928 (June 21, 1973).

CONCLUSION

It is respectfully submitted that probable jurisdiction should be noted and the decision of the Georgia Supreme Court reversed on the grounds set forth above.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-557

BILLY JENKINS,

Appellant,

V.

STATE OF GEORGIA,

Appellee.

MOTION TO DISMISS OR AFFIRM

MOTION

Under the authority of Rule 16 of the Supreme Court Appellee files this motion to dismiss this appeal, or, in the alternative, to affirm the judgment of the lower court. The decision of the court below, the Supreme Court of Georgia is reported as *Jenkins v. The State*, 230 Ga. 726 (1973).

GROUNDS OF MOTION TO DISMISS

Appellee moves to dismiss the appeal upon the ground that it does not present a substantial federal question, and on the ground that the judgment rests on an adequate non-federal basis.

The Georgia statutory scheme for prohibiting obscenity was authoritatively construed by the trial court in its instructions to the jury, and by the Georgia Supreme Court, in the decision below. It was construed as a matter of state law, and, as so construed, was constitutional under numerous prior holdings of this Court. Because the trial court correctly construed the statutory proceedings in its instructions to the jury, Appellant was not denied the due process of law. In point of fact, he was granted more rights under the Georgia law than he would have been granted under an equivalent federal prosecution.

QUESTIONS PRESENTED

Appellee cannot agree with the Appellant's statement of the questions presented to this Court by this appeal for the simple reason that Appellant fails to consider the issues in fact appealed to and decided by the Georgia Supreme Court, and fails to note that other issues were expressly abandoned. The Appellee would restate the questions presented by this appeal as follows:

I. Has the Appellant properly invoked the jurisdiction of this Court under 28 U.S.C. §1257 (2)?

II. Did the trial court correctly charge the jury on the Georgia law involved in this case?

III. Could this jury, applying the "contemporary community standards", determine that "Carnal Knowledge" is obscene?

STATEMENT OF FACTS

Appellant, Billy Jenkins, manager and president of the Broad Avenue Cinema in Albany, Georgia, exhibited the motion picture "Carnal Knowledge" on Jan-

uary 13, 1972. The film was seized pursuant to a search warrant (R. 5, 5), and Appellant was arrested for the offense of Distributing Obscene Materials. Robert W. Reynolds, District Attorney, Dougherty Judicial Circuit, returned an accusation to Superior Court charging Appellant with the offense of Distributing Obscene Materials. Trial was held on March 22 and 23, 1972. The jury, after viewing the film, hearing evidence introduced on behalf of the defendant, and being properly instructed, returned a general verdict of guilty. On appeal to the Georgia Supreme Court, Appellant's conviction was affirmed; the Georgia statutory scheme for the prohibition of obscenity was authoritatively construed; and the trial court's instructions to the jury were ruled correct. Appellant, in his brief to this Court, in his Appendix A, recites in full the opinion of the Georgia Supreme Court.

ARGUMENT

I.

THIS COURT SHOULD NOT ACCEPT JURISDICTION, ON APPEAL, TO HEAR THIS CASE.

Appellant contends that this Court's jurisdiction was properly invoked under 28 U.S.C. §1257(2). Under the authority granted therein, this Court has appellate jurisdiction to review on *appeal* any final judgment or decree rendered by the highest court of a state in which a decision could have been obtained where the validity of a state statute was questioned as violative of the federal law and "the decision is in favor of its validity." Appellant is contending, in effect, that he raised, in a proper and timely manner, in the court below, a question regarding the constitutionality of the Georgia

statutes herein under attack, *i.e., Georgia Code Ann.* §§26-2011 and 26-2105, *and* that the Georgia Supreme Court, as a basis for its decision, held that the statute did not violate the federal law.

Assuming, without conceding, that Appellant did raise, in a proper and timely manner, such a question, it did not constitute a basis for the decision appealed from. The Georgia Supreme Court resolved the questions concerning Code sections 26-2011 and 26-2105 by simple statutory construction consistent with prior (Georgia) case law. Appellant contended, at page 7 of his brief to the court below, that the "question raised is whether the Statute [*i.e.*, §26-2105] is constitutional under the First Amendment . . . for failure to include as an essential element of the purported crime . . ." the language of Code section 26-2101(b). The Georgia Supreme Court ruled, as a matter of state law, "that sections of the code which relate to the same subject matter shall be construed together. *See, Touchton v. Echols County*, 211 Ga. 85, 87 (84 SE2d 81)." Under the authority of *Murdock v. Memphis*, 20 Wall. 590, 22 L.Ed. 429 (1875), since the decision below on that point is supported by an adequate state ground, this Court should not accept jurisdiction.

Appellant further contended to the court below, that an issue presented was:

> Does the accusation, and the statute upon which it is based, . . . construed in connection with . . . the definition of the word "knowingly" violate the First Amendment . . . by depriving defendants of First Amendment freedom of expression in burdening defendant with self-censorship?

Nowhere in Appellant's brief in the court below is this

point argued, although it is referred to tangentially in connection with another issue. Under existing Georgia law, *Spurlin v. State*, 228 Ga. 2, 6 (5) (1971), Appellant is deemed to have abandoned this issue in the court below, which explains fully why the Georgia Supreme Court failed to even mention, much less to decide, the question.

Appellant's final constitutional attack on the two Georgia statutes may be found at page 8 of his brief to the court below.

> Enactment of Section 26-2011 . . . forbidding certain acts in a public place is obviously legitimate as respects the First Amendment. It is equally obvious that it is constitutionally forbidden under the First Amendment to render the same conduct a crime in a non-public place, that is, a motion picture.

The basis for Appellant's argument here is that a motion picture shown in a "non-public" place, *e.g.*, a theatre, to a willing audience, is protected under this Court's ruling in *Stanley v. Georgia*, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969). However, that question had previously been disposed of adversely to Appellant's position by the Georgia Supreme Court in *Slaton v. Paris Adult Theatre I*, 228 Ga. 343 (1971). That latter decision was affirmed by this Court in *Paris Adult Theatre I v. Slaton*, _____ U.S. _____, 93 S.Ct. _____, 37 L.Ed.2d 446 (1973), where it was stated that the exhibition of obscene material in places of public accommodation is not protected by any constitutional doctrine of privacy. A commercial theatre cannot be equated with a private home; nor is there here a privacy right arising from a special relationship; nor can the privacy of the home be equated with a "zone" of privacy that

follows a consumer of obscene materials wherever he goes. Thus, Appellant's final constitutional attack cannot support this Court's jurisdiction because not only had the argument been expressly foreclosed by an authoritative decision of this Court so as to leave no room for real controversy, but the decision rested on an independent and adequate state ground, albeit a case affirmed by this Court.

Not one of Appellant's three "constitutional" arguments can be a basis for this Court's acceptance of jurisdiction under 28 U.S.C. §1257(2). As is pointed out above, Apellant abandoned one constitutional argument below; one argument was decided on the basis of prior Georgia case law as a matter of statutory construction; and one argument has been authoritatively decided against Appellant's position by a prior decision of this Court, in *Paris Adult Theatre I v. Slaton*, *supra*. Therefore, this Court should not accept jurisdiction of this case because there was no decision below upholding the constitutionality of the statutes in question.

Furthermore, Appellant did not raise, in a proper and timely manner, any question concerning the constitutionality of these statutes. The second "constitutional" question mentioned above was abandoned below, and thus cannot be deemed to have been raised, much less decided, by the court below. The first "constitutional" question mentioned above did not attack the constitutionality of the statute. Instead, it attacked the accusation on the basis that it did not include an essential element of the crime of distributing obscene material, to wit: the test of obscenity. It was this question which the Georgia Supreme Court decided adverse to Appellant's position on the basis of statutory construction.

The final "constitutional" question allegedly raised below was not proper because it had been authoritatively decided by the Georgia Supreme Court previously, adverse to Appellant's position. It was for this reason that the court below did not even decide the question. No other "constitutional" question was raised by Appellant in attacking the statutes in question.

However, even if this Court believes that Appellant did raise, in a proper and timely manner, any one of the constitutional questions presented *and* even if this Court believes that any one of these questions served as the basis for the decision below, no substantial federal question is raised by Appellant's first two contentions.

The statute under which Appellant was convicted is constitutional on its face, as applied, and as construed and the Appellant was not denied due process of law. Appellant's first two "questions presented" are treated jointly because they essentially raise the same point. He argues to this Court, in his Jurisdictional Statement, in effect, that the statute under which he was tried and convicted is unconstitutional on its face, as applied, and as construed, and that the use of this unconstitutional statute as a basis for his conviction denies him the due process of law guaranteed under the Fourteenth Amendment. Thus, if this Court chooses to reach and decide the issue of the constitutionality of *Georgia Code Ann.* §26-2105, a resolution of that issue will dispose of both of these points raised by Appellant in this Court. It is to this question that Appellee will now speak, although it does not abandon its contention that this Court should not reach this issue, but should dismiss the appeal.

Appellant contends that *Georgia Code Ann.* §26-2105,

under which he was convicted of distributing obscene materials, is unconstitutional on its face, as applied, and as construed by the Georgia Supreme Court. He further contends that the utilization of this section to convict him in the trial court below denied him the due process of law. His basic argument here is that the statutory scheme under which he was convicted is vague and overbroad.

"Vagueness of a criminal law rests on the constitutional principle that procedural due process requires fair notice and proper standards for adjudication. If the scope of the power given to officials under a statute is so broad that the exercise of constitutionally protected conduct depends upon the subjective views of these officials as to the propriety of the conduct, the statute is unconstitutional as a denial of due process.... The concept of overbreadth of criminal laws rests on principles of substantive due process which forbid the prohibition of certain individual freedoms, the principal issue not being reasonable notice or adequate standards, though such issues may be involved, but whether the language of the statute, given its normal meaning, is so broad that its sanctions may apply to conduct protected by the Constitution." *Gable v. Jenkins*, 309 F.Supp. 998, 1000 (N. D. Ga. 1969), *affirmed* 397 U.S. 592, 90 S.Ct. 1351, 25 L.Ed.2d 595 (1970).

Judge Morgan, in *Gable*, went on to hold *Georgia Code Ann.* §26-2101 (b) and (c) constitutional, in face of an attack on the ground that it was vague and overbroad. "... Section 26-2101 ... does but two things—it prohibits the distribution of obscene materials and defines what is meant by the term 'obscene materials'. In defining this term, the statute carefully utilizes the defi-

nition of obscene materials as that term has been elucidated by the United States Supreme Court . . . This new code section, 26-2101, is simply a more limited version of the former Georgia law, §26-6301, and has a stronger constitutional base than the former Georgia statute." *Id. See, Gornto v. State*, 227 Ga. 46 (1970).

Appellant contends that *Georgia Code Ann.* §26-2105 "imposes an absolute prohibition against exhibition of motion pictures which portray any of the acts enumerated in *Georgia Code Ann.* §26-2011 . . . This *per se* prohibition operates 'across the board,' totally without regard to whether films portraying such acts are obscene . . . On its face, §26-2105 therefore makes no attempt to 'distinguish commerce in ideas, protected by the First Amendment, from commercial exploitation of obscene material.' " (Jurisdictional Statement, p. 11). As the Georgia Supreme Court comprehended Appellant's argument, it was that §26-2105 and the accusation were defective "in that it fails to include the definition of obscene materials as defined in *Code Ann.* §26-2101(b)" Appellant misstates the impact of *Georgia Code Ann.* §26-2105. Basically, that section prohibits, inter alia, obscene movies in which acts which, if done live, would constitute public indecency under *Georgia Code Ann.* §26-2011. In defining acts which constitute public indecency, this latter statute utilizes the word "lewd." Save for an act of sexual intercourse, for the designated acts to constitute public indecency, they must be performed in a "lewd" manner. Thus, for §26-2105 to prohibit a movie, the acts in that movie must be "lewd" acts. The use of the word "lewd" does not make a statute unconstitutionally vague. *U.S. ex rel. Huguley v. Martin*, 325 F.Supp. 489 (N. D. Ga. 1971). In *Piercy*

v. State, 92 Ga. App. 599 (1955), the Georgia Court of Appeals held that "the offense of lewdness was an indecency referable especially to sexual matters, and it included any gross indecency which was sufficiently open and notorious as to tend to corrupt the morals of the community." 92 Ga. App. at 600. Webster defines the "Obscene" as that which is "offensive to chastity or modesty." *Hawkins v. State*, 124 Ga. App. 53, 54 (1971). Lewd acts, as defined by these Georgia decisions, certainly are synonymous with obscene acts, under §26-2101(b). "There is little difference in the effect on the public between lewd conduct in public areas and lewd conduct explicitly performed on a motion picture screen for the viewing of the public." *Evans Theatre Corp. v. Slaton*, 227 Ga. 377, 381 (1971). In *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1941), this Court stated, "There are certain well-defined and narrowly limited classes of speech the prevention and punishment of which have never been thought to raise any constitutional problem. These include the *lewd and obscene* . . ." (emphasis added). Thus even this Court has equated the lewd with the obscene.

Appellant contends that *Cohen v. California*, 403 U.S. 15 (1971) makes it clear that "public indecency" or "indecent exposure" laws may not be applied to motion pictures and other forms of expression. *Cohen* is inapposite. It involved the prohibition of "pure speech," not "communicative conduct," as is involved here. The former has always been given the highest degree of protection available under the First Amendment. Appellant also contends that *Southeastern Promotions, Ltd. v. City of Atlanta, Ga.*, 334 F. Supp. 634 (N. D. Ga. 1971) supports his position. Nowhere in that case

does the Court even suggest that *Georgia Code Ann.* §26-2011 could not constitutionally be applied to the stage play "Hair." The Court does point out that the "foul words and nudity," where emphasizing a theatrical theme, are not lewd; mere nudity is not lewd. But here, the jury found that the conduct displayed was more than mere nudity—it was "lewd" nudity. "Lewd nudity" is a far cry from "mere nudity."

However, assuming, without conceding, that *Georgia Code Ann.* §26-2105 is, on its face, unconstitutionally overbroad, as Appellant contends, the limiting construction placed on the statute by the Georgia Supreme Court avoids any taint of *per se* invalidity. It has long been held by this Court to be within the power of a court to construe a statute narrowly in order to avoid the danger of unconstitutionality if this may be done in consonance with the legislative purpose of the statute. *See, American Communications Asso. v. Douds,* 339 U.S. 382, 70 S.Ct. 674, 94 L.Ed. 925, *rehearing denied,* 339 U.S. 990, 70 S.Ct. 1017, 94 L.Ed. 1391 (1949). The Georgia Supreme Court placed a very restrictive interpretation upon §26-2105. They pointed out that because *Georgia Code Ch.* 26-21 begins with the definition of obscenity in §26-2101(b) and (c), §26-2105, "which is merely a part of that chapter, must be read in accordance with the entire chapter. This court has held that sections of the Code which relate to the same subject matter shall be construed together." *Jenkins v. State,* 230 Ga. at 727. Thus, they read §26-2101 (b) and (c) into all of the code sections dealing with the control of obscenity. The title to that chapter of the *Georgia Code,* of which §26-2105 is a part, is "Distributing *Obscene* Materials" (emphasis added). Section 26-2101 de-

fines obscenity generally, and §§26-2102 through 26-2105 proscribe and punish specific acts dealing with material which is obscene under §26-2101 (b) and (c). Even the Committee Notes which are appended to that chapter of the *Code*, and which generally express the intent of the General Assembly in enacting the chapter, state that its purpose "is to punish the distribution or exhibition of obscene materials no matter who is the disseminator or exhibitor. Thus, any medium of distribution or exhibition is covered by this section." In interpreting this chapter, the Georgia courts were bound to consider this statement of purpose. *See, Georgia Code Ann.* §102-102(a) ("In all interpretations, the courts shall look diligently for the intention of the General Assembly, keeping in view, at all times, the old law, the evil, and the remedy.") Thus, even if it is found that a motion picture exhibits conduct which violates §26-2011, the exhibition of that motion picture cannot be prohibited unless it is also found to be obscene.

The Georgia test of obscenity has been held constitutional by this Court when it affirmed, *per curiam*, the three-judge district court decision in *Gable v. Jenkins*, *supra*. And while *Miller v. California*, _____ U.S. _____, 93 S.Ct. _____, 37 L.Ed.2d 419 (1973), adopts a test which allegedly is more restrictive of First Amendment rights, the Georgia law, until changed by the General Assembly, a possibility feared by some of the *amici*, under which Appellant was convicted was, and still remains, the *Roth-Memoirs* test. The Georgia Supreme Court, in the opinion below, acknowledged that the Georgia test was more restrictive on obscenity prosecutions. Although the states cannot grant an individual less than the constitutionally required mini-

mum of rights, the states may grant an individual more rights, unless preempted by the federal government.

Appellant, by enumerating the "possible" interpretations which could be given to Georgia's statutory scheme, is seeking to count the number of angels which could stand on the head of a pin. The Georgia Supreme Court gave this statutory scheme, including §26-2105, the obvious, common sense meaning intended by the General Assembly. The constitutional requirement is that an individual should have fair and reasonable notice of the offense, and this scheme certainly gives fair and reasonable notice that distribution of obscene material, by whatever medium, is that which is prohibited. In *Roth v. U.S.*, 354 U.S. 476, 77 S.Ct. 304, 1 L.Ed.2d 1498 (1957), this Court stated, with regard to a question of the constitutionality of the federal obscenity statute which made punishable the mailing of material that is *"obscene, lewd,* lascivious, or filthy ... or other publication of an indecent character," (emphasis added)

> "lack of precision is not itself offensive to the requirements of due process. '... [T]he Constitution does not require impossible standards', all that is required is that the language 'conveys a sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices ... These words [in the statute] applied according to the proper standards for judging obscenity ... give adequate warning of the conduct proscribed and mark ... boundaries sufficiently distinct for judges and juries fairly to administer the law ...' " 354 U.S. at 491, 1 L.Ed.2d at 1511.

Under this standard, *Georgia Code Ann.* §26-2105, as construed by the Georgia Supreme Court, meets con-

stitutional muster, and a conviction thereunder poses no substantial federal question.

Appellant also contends that even if the Georgia statutory scheme, as construed by the Georgia Supreme Court, meets constitutional muster, it cannot, as so construed, support a conviction seventeen months prior to this authoritative decision, because allegedly "[i]t would have taken 'extraordinary clairvoyance' for Appellant to have guessed . . . that the clear language of §26-2105 'really' meant what the Supreme Court of Georgia was destined to hold it means . . ." (Jurisdictional Statement, p. 19). However, the trial judge showed no "extraordinary clairvoyance," but good common sense, in correctly defining the crime with which Appellant was charged. The instructions to the jury by the trial judge were ruled correct by the Georgia Supreme Court. After stating to the jury the statutes involved in Georgia's statutory scheme (T. 65-67), the judge correctly synthesized those statutes into the offense of Distributing Obscene Materials, with which Appellant was charged.

> "The question present with regard to the obscenity of the movie herein is not whether the particular publication depicts sex or sexual activities, but the question is whether the movie can be said to be obscene within the narrow limits as to take the movie outside of the protection of the person involved." (T. 67-68).

This is basically the common sense interpretation of the statutory scheme which the Georgia Supreme Court adopted. The question put to the jury was not simply whether or not the movie portrayed certain conduct which, if done live, would have constituted public indecency; but instead, the question was *if the movie*

portrayed this conduct, was the movie thereby obscene? Quite obviously, the jury, in answering this question in the affirmative through their verdict, adopted the same common sense reading of the statutory scheme on which they were instructed and on which the Georgia Supreme Court upheld the conviction. Had Appellant actually read the statutes, and given them this same common sense reading which they demand, he would have arrived at the obvious conclusion that they prohibit obscene material such as is here involved, to wit: the movie "Carnal Knowledge." Furthermore, the Georgia Supreme Court's opinion, when read in light of the instructions which it was upholding, was not "somewhat ambiguous," as Appellant alleges, but was crystal clear.

Appellant cites *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 89 S.Ct. 935, 22 L.Ed.2d 162 (1969) to support his argument that the later construction, by the Georgia Supreme Court, of *Georgia Code Ann.* §26-2105, which sufficiently limited the operation of the statute so as to make it constitutional, cannot suffice "to restore constitutional validity to a conviction" that occurred more than a year earlier under the statute "as it was written." *Shuttlesworth* involved a Birmingham licensing ordinance which constituted a prior restraint for the "public welfare, peace, safety, health, decency, good order, morals or convenience," on the free exercise of protected methods of expression, *e.g.*, picketing and parading, without narrow, objective, and definite standards to guide the licensing authority. It is factually distinguishable. The holding in *Shuttlesworth* was based on two points: (1) an ordinance such as the one there involved, which makes the peaceful

enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will an of official is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms. Prior to the ruling in *Shuttlesworth*, this Court had "consistently condemned licensing systems which vest in an administrative official discretion to grant or withhold a permit upon broad criteria unrelated to proper regulation of public places." 394 U.S. at 153. (2) Despite a subsequent limiting construction of the ordinance by the Alabama Supreme Court four years after the conviction, which construction this Court assumed would result in the ordinance passing constitutional muster, the facts of the case showed that the ordinance was read and applied exactly as it was written, which resulted in an unfair, discriminatory and arbitrary decision by the licensing authority. After emphasizing these two points, this Court reversed *Shuttlesworth's* conviction. However, this case presents no basis for reversing Appellant's conviction. Unlike picketing and parading, the "lewd and obscene" are not forms of expression protected by the First Amendment. *Chaplinsky v. New Hampshire, supra.* Here there was no prior restraint placed upon Appellant's activity. Here, the District Attorney who brought the accusation against Appellant was not vested with unbridled discretion to act based on criteria unrelated to the proper regulation of the evil at which the legislation was aimed. He had to prove to a jury of Appellant's peers beyond a reasonable doubt that Appellant exhibited a motion picture, to wit: "Carnal Knowledge," which contained scenes showing (a) an act of sexual intercourse, (b) a *lewd* exposure of the sexual organs, (c) a *lewd* appearance in a state of partial or complete nudity, and (d) a

lewd caress or indecent fondling of another person. Furthermore, he had to prove beyond a reasonable doubt that this movie was obscene, under the existing test for obscenity in Georgia. Here, the statutory scheme was narrowly construed and correctly interpreted by the trial judge in his instructions to the jury which convicted Appellant; and, as so construed and interpreted, this statutory scheme meets constitutional muster. The Georgia Supreme Court merely adopted and explained the construction and interpretation of the trial judge.

Thus, Appellant was not denied the due process of law because the statutory scheme under which he was convicted for distributing obscene materials, §26-2105, *et. al.*, was constitutional, as construed, prior to his conviction.

II.

THE TRIAL COURT PROPERLY CHARGED THE JURY IN THIS CASE.

Although Appellant does not raise in this Court a question regarding the charge of the trial court, thirty-eight of his forty-three enumerations of error to the Georgia Supreme Court questioned the trial judge's charges or his failure to give certain requested charges. These were the questions properly and timely raised by Appellant below, and these were questions considered and decided by the Court below.

The Georgia test of obscenity is the *Roth-Memoirs* test, enunciated by this Court and accepted as the definitive word until the *Miller* decision. The Georgia Supreme Court, in the decision below, ruled that the

trial court correctly charged this definition of obscenity as the guideline for the jury to apply in this particular case. Regarding the test of obscenity, the trial court charged substantially the law contained in the requested charges. The failure to give a requested charge in the exact language of the request where the substance of the request is in fact charged is not grounds for a new trial. *See, Simmons v. State,* 226 Ga. 401, 402 (1970); *Young v. State,* 226 Ga. 553 (5) (1970); *McKinney v. State,* 121 Ga. App. 815 (3) (1970). In addition, a great majority of the requested charges on obscenity are taken directly from the language of the appellate courts. The Georgia courts have frequently held that language may be appropriate for the appellate courts while not appropriate for a charge to the jury. *See, Slater v. Dodd,* 108 Ga. App. 879, 880 (1964).

The trial judge correctly instructed the jury in the necessary interplay of the statutes involved in the statutory scheme prohibiting the distribution of obscene materials. It is clear that when a Code section incorporates a reference to another Code section, as is involved here, i.e., *Georgia Code Ann.* §§26-2105 and 26-2011, it is entirely proper, and even necessary, to charge on both code sections. For this reason, the trial court was entirely proper in charging the law of public indecency under Code §26-2011. Clearly, this charge was not only correct, but was indeed necessary so that the jury might completely understand the statutory scheme which the defendant was charged with violating. The question which the trial court put to the jury, as was pointed out previously, was essentially that which the Georgia Supreme Court ruled proper: *If the material portrayed conduct which, if done in a public*

place, would have constituted public indecency, was the movie thereby obscene under the Georgia test of obscenity?

Finally, the trial court gave an accurate and proper charge in reference to the distribution of obscene materials. This was not a charge on pandering, under *Ginzburg v. U.S.*, 383 U.S. 463 (1966), but was instead taken from *Georgia Code Ann.* §26-2101(c), and was construed by the Georgia Supreme Court to be read into the other sections of *Georgia Code Ch.* 26-21 as a definition of obscenity. It deals essentially with an added dimension that can be used in making a determination as to what constitutes obscene material.

Each question presented below which raised an issue regarding the charge of the trial court was either expressly or impliedly resolved by the court below on a non-federal basis. The decision rested on statutory construction, an adequate and independent state ground. *Murdock v. Memphis, supra.* The statutory construction is conceded to be constitutional by the Appellant, and it is binding on this Court. It presents no substantial federal question.

III.

THE ONLY ISSUE RAISED AND DECIDED REGARDING THE APPLICABLE STANDARD WAS IN REFERENCE TO THE CHARGE OF THE TRIAL COURT, WHERE THE APPELLANT CONTENDED THAT THE TRIAL COURT SHOULD HAVE CHARGED THAT *NATIONAL* COMMUNITY STANDARDS SHOULD APPLY.

Appellant contends that one question presented to this Court is

III. Whether it is constitutionally permissible to

> employ "local," as opposed to statewide, contemporary community standards in evaluating the prurient interest appeal and patent offensiveness of allegedly obscene material. (Jurisdictional Statement, p. 4).

This issue is presented here for the first time by Appellant, since it was never raised in a proper and timely manner below. This issue should not, for this reason, be considered by this Court.

The given charge was couched strictly in the language of *Georgia Code Ann.* §26-2101(b):

> Material is obscene if considered as a whole, applying community standards, its predominant appeal is to the prurient interest, . . . and utterly without redeeming social value, and if, in addition, it goes substantially beyond customary limits of candor in describing or representing such matters. (T. 66).

Under Georgia law, a charge based on the language of the applicable statute is always proper. *See, Kimbrell v. State*, 57 Ga. App. 172 (1938). Clearly, under Georgia law, this charge was not erroneous.

In his Enumeration of Errors to the Georgia Supreme Court, the Appellant raised the narrow issue that the trial court erred in failing to charge that a "national" standard should be applied by the jury. He contended that the court also erred in refusing to give six separate requested charges, all of which dealt with the scope of the contemporary community, which Appellant argued was "national" and not "local." He contended that in the charge the trial court gave, the jury was left with "the clear and strong understanding that community standards will be limited to Albany and Dougherty County, Georgia, alone, and removing from the con-

sideration of the jury the test of obscenity as applied to community standards, in the nation as a whole . . ." Appellant contends that *Roth*, *Jacobellis*, and *Feldschneider v. State*, *infra*, dictates the use of "national" standards as opposed to "local" standards. However, as will be pointed out below, these cases are distinguishable on this point.

The court below did not determine that "local," as opposed to statewide, standards should be applied in Georgia, because that question simply was not raised. It did determine that *Miller* "held that juries can consider *State or local* community standards in lieu of 'national' standards . . ." *Jenkins v. State*, *supra* at 728 (emphasis added). Long-standing Georgia law and federal constitutional requirements are now congruent, and because the decision below was based on independent and adequate state law grounds, which were constitutional at the time of Appellant's conviction, no substantial federal question is presented.

However, in response to Appellant's contention that it is constitutionally impermissible to employ "local" as opposed to "national," contemporary community standards in evaluating the prurient interest appeal and the patent offensiveness of allegedly obscene material, under *Georgia Code Ann.* §26-2101(b), Appellee urges that the existing constitutional law, as enunciated in *Miller*, is the first definitive ruling by this Court on the extent of the "contemporary community," and that ruling, consistent with Georgia law, is entirely proper and is controlling on this point. The fact that this Court upheld the determination of the trial court in *Miller* that the jury was to apply contemporary community standards of the State of California does not

constitute a sufficient basis for requiring a decision on any such issue in the instant case. In responding to Appellant's contention, Appellee does not abandon its contention that this point was not raised below and thus should not be decided by this Court.

The question has, since *Roth*, been, what is the scope of the "contemporary community"? This Court "has not enunciated a national standard test in any majority opinion and no combination of members . . . making up a majority have indicated approval of such a standard." *U.S. v. Groner*, 479 F. 2d 577, 582 (5th Cir. 1973). There has been no statement in any majority opinion in this Court as to the geographical scope of the term "community." Id. at 581. In *Jacobellis v. Ohio*, 378 U.S. 184, 84 S.Ct. 1676, 12 L.Ed. 2d 793 (1964), two Justices, Brennan and Goldberg, deemed community standards to mean a nationwide or national test; the community was to be "society at large" or the "people in general." The Chief Justice, joined by Justice Clark, disagreed arguing that community meant local community standards. *Id.* For this reason, the decision of the Georgia Court of Appeals in *Feldschneider v. State*, 127 Ga. App. 745, 748 (1972) cannot represent the true state of the Georgia law, and was overruled *sub silentio*, by the decision below.

The controlling standard in Georgia at the time of Appellant's conviction was enunciated in *Gornto v. State, supra*, at 48: "the standard to be applied is not what may or may not have been held to be obscene in other jurisdictions, but what is acceptable in the local community. The jurors represented the average members of their own community and as triers of fact, were charged with the responsibility of making such

determination guided by the evidence presented and by their individual and collective awareness of the standards and norms of their community." The Fifth Circuit has also adopted the definition of "community." *U.S. v. Groner, supra* at p. 583: "For the trial of obscenity cases under federal law 'the community' should logically embrace that area from which the jury is drawn and selected. . . . It does not seem reasonable or sensible to require a jury in federal criminal obscenity cases drawn from a single district or division to assess the thinking of the average person of the community, to consider the common conscience of the community, or the present-day standards of the community if the word 'community' is to include all of the people within the boundaries of this vast nation . . ." Thus, contrary to Appellant's argument on this point, the definition of "the geographic parameters and nature of the 'local' community" was crystal clear when Appellant committed the act for which he was convicted.

Furthermore, the local standard adopted by Georgia, comports with this Court's ruling in *Miller*. "To require a state to structure obscenity proceedings around evidence of a *national* 'community standard' would be an exercise in futility." When this Court's language is considered in light of the background surrounding this debate, the veil over its meaning becomes transparent.

IV.

THE JURY EMPANELED IN THIS CASE COULD, AND DID, DETERMINE THAT THE FILM "CARNAL KNOWLEDGE" WAS OBSCENE, WHEN "CONTEMPORARY COMMUNITY STANDARDS" WERE APPLIED, AND THAT DETERMINATION SHOULD NOT BE DISTURBED BY THIS COURT.

The Appellant finally contends that this Court should determine "whether the film 'Carnal Knowledge' is obscene." He urges that this Court should reverse the finding of facts by the jury below, that "Carnal Knowledge" is obscene under the Georgia test of obscenity. Not one of Appellant's forty-three enumerations below questioned this point, and Appellant failed to argue this point in his brief below. For this reason, the Georgia Supreme Court did not reach or decide this question. It decided only "that the evidence in this record amply supports the verdict of guilty." *Jenkins v. State*, 230 Ga. at 728. Since Appellant failed to raise this question below in a proper and timely manner, and because Appellant is attempting to raise this question for the first time in this Court, this Court should not reach or decide the issue.

The *Miller* decision is dispositive of this issue, even if this Court decides that the question should be considered. The intent of this Court, as enunciated in *Miller*, is clear: This Court will not reverse the jury's decision on the facts—and the question raised by Appellant is one, purely and simply, of fact—except in the case of an issue of overriding national import. Any other decision by this Court, such as is urged by the Appellant, says that the trial by jury, traditionally

considered to be a basic constitutional requirement in criminal prosecutions, becomes a superfluous, formal waste of the time and money of the involved parties. Furthermore, acceptance of Appellant's position by this Court is clearly an adoption by this Court of the role of final review board for all of the several thousand new and potentially questionable films released each year. Appellee urges that this Court summarily dismiss this question because it was never raised below. Unless this Court does so, Appellant's final question should be rephrased as follows: Can any jury, properly and constitutionally instructed upon the test of obscenity, applying contemporary community standards, *ever* determine that "Carnal Knowledge" is obscene? Appellee would suggest that this has always been the role of the jury, in all cases, and that this Court never meant to suggest that this role should be anything but that attributed to the jury. To this question Appellee will now turn, but without conceding or abandoning its contention that this Court should not even reach, much less decide, the issue.

In First Amendment cases, it is settled that an appellate court must make an independent constitutional judgment on the facts and the quantum of proof of the case in order to insure that if the material is constitutionally protected, vital First Amendment rights are not discarded. *Jacobellis v. Ohio*, 378 U.S. at 190, 12 L.Ed.2d at 799. But what is the extent of this review? In the habeas corpus proceedings which followed the affirmance of the *Gornto* case, *Gornto v. McDougall*, 336 F.Supp. 1372 (S. D. Ga. 1972), Chief Judge Lawrence stated:

> "Yet everything up to that point [i.e., the consideration, on application for certiorari, by this

> Court of the *Gornto* case] is but idle show, a spinning of judicial wheels. All that has been accomplished so far is to make a record in the trial court upon which the federal courts will on habeas corpus application render a *de novo*, apodictic judgment as to obscenity and First Amendment protection. And when I say federal courts I mean three separate levels of the judiciary— . . . each deciding for itself, according to its own light the matter of obscenity *vel non*.
>
> "There is a wonderlandish, Oz-like quality about the whole thing. The function of federal courts in these cases is a bewildering anomaly. Do they review the trial court record and determine whether or not the publication is obscene as a matter of law? Or do they determine such as a matter of fact and as though they were jurors? Does the verdict of a state jury finding a publication to be obscene under proper instructions carry any weight at all?"

836 F.Supp. at 1376.

In *U.S. v. A Motion Picture Film*, 404 F.2d 196 (2nd Cir. 1968), Chief Judge Lumbard, in his dissenting opinion, stated, "[T]he majority would take away from the jury the power to pass on these not too difficult and complicated questions by saying that obscenity is 'an issue of constitutional law' rather than an issue of fact with respect to which the jury's finding has its usual conclusive effect." 404 F.2d at 203, 204.

This Court, in *Miller*, stated that the standards of precisely what appeals to the prurient interest or is patently offensive are essentially questions of fact. "When triers of fact are asked to decide whether 'the average person, applying contemporary community standards' would consider certain materials 'prurient,' it would be unrealistic to require that the answer be based on some abstract formulation. The adversary

system, with lay jurors as the usual ultimate fact finders in criminal prosecutions, has historically permitted triers-of-fact to draw on the standards of this community, guided always by limiting instructions on the law" _____ U.S. _____, 37 L.Ed.2d at 434. Thus, the determination of the "contemporary community standards" is a question of fact, not of constitutional law, and, save for some constitutional infirmity in the law applied, the jury's decision, being the ultimate and binding arbitration of the fact, and application of the law thereto, is not to be overruled based on the appellate court's motion of some abstract, metaphysical amorphous "national standard". Clearly, it was never intended that the appellate courts should supersede the jury in its capacity as fact finder. And yet this has been the result of the application of "national standards". The *Miller* decision resolved this "bewildering anomaly," and returned the decision of the jury to its rightful position in obscenity cases. Obviously, within our adversary legal system, wherein juries are the traditional finders of fact, local standards are the only logical criteria. Application of the alternative system of national standards in the manner previously utilized, to overrule the jury's decision as to what is obscene, merely casts doubts on the value of the jury system.

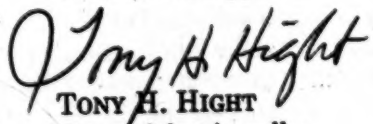
Because Georgia law required the use of local standards in 1972 when Appellant was convicted, and as this has now been held to be constitutionally permissible under the First Amendment, in the *Miller* case, the decision of the jury finding "Carnal Knowledge" obscene should not be disturbed. Save for errors of constitutional magnitude in the trial and instructions, the decision of the jury in this case, applying contemporary community standards to the movie finding it obscene is a decision of fact, and should not be disturbed.

CONCLUSION

Since the decision below rested essentially on independent and adequate state grounds and in view of Appellant's failure to raise a substantial federal question, the Appellee respectfully urges that this court dismiss the appeal, or, in the alternative, affirm the decision of the Georgia Supreme Court.

Respectfully submitted,

CARTER GOODE
Counsel for Appellee



TONY H. HIGHT
Counsel for Appellee

CERTIFICATE OF SERVICE

GEORGIA, FULTON COUNTY

I, Carter Goode, of Counsel for the State of Georgia, Appellee in the foregoing case, certify that I have this day served a copy of the foregoing motion to dismiss or affirm upon Appellant, by depositing in the United States Post Office in Atlanta, Georgia, a copy of the same in separate envelopes addressed to: Tenche C. Cox, 1500 Candler Building, Atlanta, Georgia 30303; Louis Nizer, 477 Madison Avenue, New York, New York 10022; James Bouras, 522 Fifth Avenue, New York, New York 10036, attorneys for Appellant, with sufficient postage affixed thereto.

This 7th day of November, 1973.

Carter Goode

CARTER GOODE
Counsel for Appellee

FILED
NOV 28 1973
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. 73-557

BILLY JENKINS,
Appellant
v.
STATE OF GEORGIA,
Appellee

On Appeal from the Supreme Court of Georgia

APPELLANT'S REPLY TO APPELLEE'S MOTION TO DISMISS OR AFFIRM

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APPENDIX

Opinion of the Supreme Court of Georgia in *Slaton* v. *Paris Adult Theatre I* (October 30, 1973).

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. 73-557

BILLY JENKINS,
Appellant
v.
STATE OF GEORGIA,
Appellee

On Appeal from the Supreme Court of Georgia

APPELLANT'S REPLY TO APPELLEE'S MOTION TO DISMISS OR AFFIRM

Appellant Billy Jenkins submits this reply in opposition to Appellee State of Georgia's Motion to Dismiss or Affirm this appeal, and respectfully shows the following:

I.

This appeal raises substantial federal questions with respect to the validity of Georgia Code Ann. §26-2105.

Appellee contends, in the alternative, that Appellant did not challenge the constitutionality of Georgia Code Ann. §26-2105 in a timely and proper manner in the proceedings below; or, if he did, "there was no decision below upholding the constitutionality of the statutes in question"; or, if there was, no substantial federal questions are presented because the Supreme Court of Georgia's construction of §26-2105 was proper

under Georgia case law; or, as now construed, §26-2105 is constitutional in any case. (Motion to Dismiss or Affirm, pages 3-14.)

Appellee's contentions are clearly incorrect.

Throughout the proceedings below, Appellant expressly challenged the constitutionality of §26-2105 on its face and as applied to him. See Demurrer in the trial court (R. 4, 9); Appellant's Enumeration of Errors in the Supreme Court of Georgia (R. 3, 10-13); Appellant's Brief in the Supreme Court of Georgia (pages 5, 10-13).

When the Supreme Court of Georgia affirmed Appellant's conviction despite his challenge to the validity of §26-2105, "the federal question was decided and . . . its decision was essential to disposition of the case . . . ." *Herb* v. *Pitcairn*, 324 U.S. 117, 126 (1945). Whether the Court's construction of §26-2105 was permissible under Georgia case law is beside the point; the issue here is whether the Supreme Court of Georgia "incorrectly adjudge[d] federal rights."[1] *Ibid.* See also: *Lawrence* v. *State Tax Commission*, 286 U.S. 276, 282-283 (1932).

In the Jurisdictional Statement (pages 14-16), Appellant noted that the Supreme Court of Georgia's construction of §26-2105 in this case, now reported as *Jenkins* v. *State*, 230 Ga. 726, 199 S.E. 2d 183 (July 2, 1973) (hereinafter "*Jenkins*"), was subject to two possible interpretations, both of which raised substantial federal questions.

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[1] Including Appellant's right to due process of law. See Point II, *infra*.

In its Motion to Dismiss or Affirm (page 9), Appellee argues that one of these two possible interpretations is correct — namely, that the definition of obscenity contained in Georgia Code Ann. §26-2101(b) (the plurality *Memoirs* formulation)[2] is to be applied to films portraying the acts of "public indecency" encompassed by §26-2105, including a "lewd appearance in a state of partial or complete nudity" and a "lewd caress or indecent fondling of the body of another person."[3] If this interpretation is correct, Appellant continues to think it raises substantial federal questions as to the overbreadth of the portrayals of conduct to which §26-2105 applies.

However, any consideration of §26-2105 must now take into account the Supreme Court of Georgia's decision of October 30, 1973, in *Slaton* v. *Paris Adult Theatre I*, — Ga. —, — S.E. 2d — (Appendix AA) (hereinafter "*Paris*"), decided upon remand by this Court, *Paris Adult Theatre I* v. *Slaton*, — U.S. — (1973). Although *Paris* involved §26-2101(b) alone, it must necessarily have considerable impact upon §26-2105 as construed in this case.

As a result of *Paris*, it is unclear, for example, whether there are now one or two obscenity statutes in Georgia, and, if two, exactly how they differ. Whereas §26-2105 as construed in *Jenkins* might have continued to apply to certain acts of "public indecency," *Paris*

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[2] *Memoirs* v. *Massachusetts*, 383 U.S. 413, 418 (1966) (plurality opinion).

[3] §26-2105 merely prohibits the portrayal in a motion picture of the acts which would constitute "public indecency" under Georgia Code Ann. §26-2011. The acts themselves are enumerated in §26-2011.

says that §26-2101(b) had been construed *in 1971* to apply to different acts — "acts of sexual intercourse, natural, unnatural, bizarre, and violent" and "actual sexual activity, both natural and unnatural" (App. AA, 6). Since *Jenkins* holds that the two statutes must be "construed together," it is impossible to determine whether §26-2105 now applies to the acts specified to constitute "public indecency," *or* to the acts to which *Paris* says §26-2101(b) has applied since 1971, *or* to both types of acts, *or* to any acts at all.

For further example, whereas *Jenkins* held that it was permissible to apply "local" community standards under §26-2105, *Paris* holds that the community standards to be applied under §26-2101(b) must be statewide in scope (App. AA, 8-9). Again, since the two statutes must be "construed together," it is now impossible to determine whether §26-2105 will, or must, be applied in accordance with "local" or statewide community standards.[4]

Under these circumstances, §26-2105 clearly fails to give persons of ordinary intelligence "fair notice" of exactly what it prohibits and, moreover, encourages arbitrary and erratic arrests and convictions. See, e.g., *Papachristou* v. *City of Jacksonville*, 405 U.S. 156, 162 (1972). And while this Court undertook in *Miller* v. *California*, — U.S. —, 5, 13 (1973),[5] "to formulate

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[4] In *Jenkins*, however, the Supreme Court of Georgia affirmed Appellant's conviction on the basis of its holding that it was proper to apply "local" community standards. Accordingly, the constitutional propriety of "local," as opposed to statewide, community standards continues to be an issue before this Court in this case.

[5] As in the Jurisdictional Statement, all page references em-

standards more concrete than those in the past" so that obscenity laws would "provide fair notice to a dealer in such materials that his public and commercial activities may bring prosecution," the Supreme Court of Georgia's two post-*Miller* decisions — *Jenkins* (July 2, 1973) and *Paris* (October 30, 1973) — have led the law in Georgia, at least insofar as §26-2105 is concerned, in exactly the opposite direction.

II.

Appellant was denied due process of law in the proceedings below, including those in the Supreme Court of Georgia.

Appellant was accused[6] only of violating §26-2105, a statute which neither contains nor implies the concept of obscenity, and this accusation was binding upon the State.[7]

Nevertheless, the trial judge's instructions to the jury encompassed three separate and distinct statutory provisions, defining three separate and distinct offenses,[8] and the jury returned only a general verdict of guilty.

Appellee contends that, had Appellant given these

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ployed herein in connection with this Court's obscenity decisions of June 21, 1973, are to the slip opinions.

[6] The Jurisdictional Statement (page 5) erroneously stated that the accusation was returned by the Grand Jury of Dougherty County; actually, the accusation was returned merely upon signature of the District Attorney.

[7] See, e.g., *Wood* v. *State*, 219 Ga. 509, 134 S.E. 2d 8 (1963).

[8] See, e.g., *Campbell* v. *State*, 106 Ga. App. 588, 127 S.E. 2d 698 (1962); *Bennett* v. *State*, 108 Ga. App. 265, 132 S.E. 2d 816 (1963).

separate and distinct statutory provisions the "common sense reading which they demand," he would have known that they would be read and applied together. (Motion to Dismiss or Affirm, page 15.) Indeed, Appellee goes even further than the Supreme Court of Georgia expressly went and contends that §26-2101(c) ("pandering" or intent to pander) is to be read and applied together with §§26-2101(b) and 26-2105. (Motion to Dismiss or Affirm, page 19.)[9]

If a "common sense reading" demanded anything, it was that the three statutory provisions be read as defining three separate and distinct offenses. §§26-2101 and 26-2105 were passed by different legislatures — in 1968 and 1971, respectively — and have separate penalty provisions.[10] As of 1971, §26-2101(b) had already been construed to apply to portrayals of acts different from those encompassed by §26-2105 (App. AA, 5-6). The only possible "common sense reading" of §26-2105 on its face was that it "attempts to transfer the crime of public indecency into the motion pic-

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[9] Appellee contends that §26-2101(c) does not embody "pandering" concept, *cf. Ginzburg* v. *United States*, 383 U.S. 463 (1966), but rather expresses only an "added dimension" to be considered in determining whether material is obscene *per se*. Appellee does not specify what the nature of this "added dimension" might be. By so contending, Appellee only underscores the vague and overbroad manner in which §26-2105 may now be applied (See Point I, *supra*). In addition, if the Supreme Court of Georgia did implicitly so hold, it only emphasizes the completely unpredictable way in which §26-2105 was construed in this case.

[10] Under §26-2101(d) an initial violation of §26-2101 constitutes a misdemeanor but any subsequent violation shall constitute a felony, whereas, under §26-2105 both the initial and subsequent violations constitute only a misdemeanor.

ture art form" (Gunter, J., dissenting in *Jenkins*, Jurisdictional Statement, App. A, 14).

It was only on July 2, 1973, when the Supreme Court of Georgia affirmed his conviction, that Appellant knew or could have known that §§26-2101(b) and 26-2105 were to be "construed together." Since Appellant's "conviction was thus affirmed under a statute with a meaning quite different from the one he was charged with violating," *Rabe* v. *Washington*, 405 U.S. 313, 315 (1972) (per curiam), he was clearly denied due process of law. See also: *Ashton* v. *Kentucky*, 384 U.S. 195, 198 (1966); *Bouie* v. *City of Columbia*, 378 U.S. 347, 353-355 (1964).

III.

It is constitutionally impermissible to apply "local," as opposed to statewide, community standards in evaluating the prurient interest appeal and patent offensiveness of allegedly obscene material.

Appellant would add here only that post-*Miller* decisions are in conflict as to whether the applicable community standards must be statewide in scope or whether a purely "local" standard may be applied. Accordingly, this issue should be resolved by this Court.

Some post-*Miller* decisions hold that the applicable community standards may be "local." See, e.g. *Rhodes* v. *State*, — So. 2d — (Supreme Court of Florida; Case No. 41,416; September 19, 1973); *Brazelton* v. *State*, 282 So. 2d 342, 343 (Ala. Ct. Crim. App., June 29, 1973). Others hold that the applicable community

standards must be statewide in scope. See, e.g., *State* v. *J-R Distributors, Inc.*, 512 P. 2d 1049, 1065 (Supreme Court of the State of Washington, July 27, 1973). And one court has even held that *both* statewide and "local" standards should be applied. *Richards* v. *State*, 497 S.W. 2d 770, 777 (Texas Ct. Civ. App., July 2, 1973).

Most strikingly, in Georgia there are now two post-*Miller* decisions by the State's highest court — *Jenkins* (July 2, 1973) and *Paris* (October 30, 1973) — which reach contradictory conclusions as to what community standards must or may be applied.

IV.

Whether the film "Carnal Knowledge" is obscene is an issue properly before this Court.

Whether a particular work may be suppressed as obscene is "a question of constitutional *judgment* of the most sensitive and delicate kind." *Roth* v. *United States*, 354 U.S. 476, 498 (1957) (opinion of Harlan, J.) (emphasis in original).

Yet Appellee takes the position that determinations of prurient interest appeal and patent offensiveness should be left to the jury, under proper instructions, and its finding should not be disturbed on appeal. (Motion to Dismiss or Affirm, pages 24-27)[11] Appel-

[11] Appellee's contention that the issue of obscenity was not raised in and passed upon by the Supreme Court of Georgia is clearly incorrect. The *Jenkins* majority expressly stated that it had affirmed Appelant's conviction only "After a review of the record and a viewing of the film . . . ." (Juris-

lee does not even mention the third requirement: that the work be "utterly without redeeming social value" (Georgia law) or lack "serious literary, artistic, political, or scientific value" (the *Miller* test).

Appellee's position thus flies squarely in the face of this Court's holding that appellate courts retain "the ultimate power . . . to conduct an independent review of constitutional claims when necessary." *Miller* v. *California*, supra at 10.

In answer to Appellee's phrasing of the question (Motion to Dismiss or Affirm, page 25), Appellant does not think a jury can "ever" properly determine that "Carnal Knowledge" is obscene,[12] for the film clearly possesses "serious literary, artistic, political, or scientific value."[13]

Indeed, it is Appellant's view that it would be particularly appropriate for this Court to determine the issue of obscenity in this case. For while this Court's obscenity decisions of June 21, 1973, were clearly and expressly directed only against "the public portrayal of hard core sexual conduct for its own sake," *Miller* v. *California*, *supra* at 20, there can be no doubt that those decisions "will have radiating consequences,

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dictional Statement, App. A, 1). In addition, the dissents make it clear that "This Court has conducted an independent review" (App. A, 11) and "an independent appellate review" (App. A, 16).

[12] The issue here is obscenity *per se*. This case does not involve exhibition to minors, "obtrusive" exhibition to unwilling persons, or "pandering."

[13] Nor does the film appeal to the prurient interest or portray sexual conduct in a patently offensive way.

and that these will be to encourage Comstockian tendencies." Bickel, *The Least Dangerous Branch* 140 (1962).

If such unintended "radiating consequences" are inevitable, and the Supreme Court of Georgia's decision in this case is proof that they are, the only way in which this Court can prevent their becoming the norm, rather than merely a temporary aberration, is to quickly and forthrightly declare that it did *not* direct its obscenity decisions of June 21, 1973, against a film like "Carnal Knowledge."

This Court has recognized that "the risk of being foreclosed, in practical effect, from a significant portion of the movie-going public" undoubtedly has an effect on what films will be made and exhibited in the future. *Interstate Circuit* v. *Dallas*, 390 U.S. 676, 684 (1966). The fact that a film as serious as "Carnal Knowledge" has been held obscene by the Supreme Court of Georgia makes the risk of foreclosure not only very real but immediate, and, unless the judgment below is reversed, cannot help but have a significant impact on films which will be available to the public in the future — an impact, moreover, which goes far beyond what this Court intended. "The First Amendment interests here are, therefore, broader than merely those of the film maker, distributor, and exhibitor...." *Ibid.*

CONCLUSION

For the reasons set forth above, Appellee's Motion to Dismiss or Affirm should be denied, and the Judgment of the Supreme Court of Georgia should be reversed.

Respectfully submitted,

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APPENDIX AA

IN THE

SUPREME COURT OF GEORGIA

Decided: October 30, 1973

26631 SLATON, Et Al.
v. PARIS ADULT THEATRE I, Et Al.

INGRAM, Justice. This case comes before the court again following decision and remand by the United States Supreme Court in Paris Adult Theatre I v. Slaton, 413 U. S. _____, 93 S. Ct. 2628, 37 L. Ed. 2d 446 (1973). It began on December 28, 1970, when the District Attorney of the Atlanta Judicial Circuit and the Solicitor of the Criminal Court of Fulton County filed separate complaints in the Superior Court of Fulton County against Paris Adult Theatres I and II and certain named individuals, praying for a rule nisi to require the defendants to show cause why the motion picture films "It All Comes Out in the End," and "Magic Mirror" should not be declared obscene and enjoined from exhibition. A temporary restraining order was thereafter granted ex parte by the trial court restraining the defendants from destroying the films or removing them from the jurisdiction of the court pending a hearing. On January 31, 1971, *pursuant to the rule nisi, an adversary hearing was conducted in superior court during which the parties agreed to waive jury trial and a preliminary hearing and to submit the cause to the trial court for final determination and judgment.* The films were then exhibited to the trial court. The State offered no other

evidence at the hearing except for the testimony of the criminal investigators who had paid admission to see the films and who related that nothing on the outside of the theatres indicated the full nature of that which was shown, namely, scenes of simulated fellatio, cunnilingus and group sex intercourse.

After viewing the motion pictures and hearing the evidence, the trial court rendered the following judgment:

"The State contends that the motion pictures under review in the above actions are obscene. The titles of the films are, 'It All Comes Out in the End,' and 'Magic Mirror'. Assuming that obscenity is established by a finding that the actors cavorted about in the nude indiscriminately, then these films may fairly be considered obscene. Both films are clearly designed to entertain the spectator and perhaps, depending on the viewer, to appeal to his or her prurient interest. The portrayal of the sex act is undertaken; but the act itself is consistently only a simulated one if, indeed, the viewer can assume an act of intercourse or of fellatio is occurring from the machinations which are portrayed on the screen. Each of the films is childish, unimaginative, and altogether boring in its sameness.

"It appears to the court that the display of these films in a commercial theatre, when surrounded by requisite notice to the public of their nature and by reasonable protection against the exposure of these films to minors, is constitutionally permissible.

"It is the judgment of this court that the films, even though they display the human body and the

human personality in a most degrading fashion, are not obscene.

"The actions against the defendants, therefore, are dismissed.

"This 12th day of April, 1971.

Jack Etheridge, Judge
Superior Court of Fulton County
Atlanta Judicial Circuit."

On appeal from the above order, this court unanimously reversed the judgment of the trial court and held that the films were hard-core pornography and that the showing of these films should have been enjoined in that their exhibition to consenting adults was not protected by the First Amendment. *Slaton v. Paris Adult Theatre I*, 228 Ga. 343 (185 SE2d 768) (1971). The United States Supreme Court granted certiorari on June 26, 1972, and thereafter on June 21, 1973, vacated the judgment of this court and remanded the case for further proceedings not inconsistent with its opinions rendered in *Paris Adult Theatre I v. Slaton*, 413 U. S. _____, 37 L. Ed. 2d 446, 93 S. Ct. 2628 (1973), and *Miller v. California*, 413 U. S. _____, 37 L. Ed. 2d 419, 93 S. Ct. 2607 (1973). See, also *United States v. 12 200-Ft. Reels of Super 8 mm Film*, 413 U. S. _____, 37 L. Ed. 2d 500, 93 S. Ct. 2665 (1973).

On August 27, 1973, we granted counsel for opposing sides and the Attorney General, leave to submit briefs to assist this court in assessing the effect of these opinions upon the earlier judgment of this court

and upon the legislative enactments of this State on obscenity.

I

OVERBREADTH

It is now firmly established that "obscenity" is not protected by the Free Speech Clause of the First Amendment and may be regulated by the State. *Miller v. California*, 413 U. S. ——, 37 L. Ed. 2d 419, 93 S. Ct. 2607 (1973); *Roth v. United States*, 354 U. S. 476 (1957); *Chaplinsky v. New Hampshire*, 315 U. S. 568 (1942). In order to maintain the integrity of the First Amendment and to prevent incursions into areas of protected speech and expression, the United States Supreme Court has made it necessary, however, that regulatory statutes be carefully limited to define specific sexual conduct to whose depiction and description they apply. *Miller v. California*, 413 U. S. at ——, 37 L. Ed. 2d at 430, 93 S. Ct. at 2615 (1973). In *Miller* and in *United States v. 12 200-Ft. Reels of Super 8 mm Film*, 413 U. S. ——, 37 L. Ed. 2d 500, 93 S. Ct. 2665 (1973), the Court made clear that this statutory requirement could be met by specific legislation, as e.g. Oregon Laws 1971, c. 743, Art. 29 §§ 255-62 and Hawaii Penal Code, Title 37, § § 1210-16, and as well by authoritative judicial interpretation of legislation such as Ga. Code Ann. § 26-2101 (b) (Ga. L. 1968, pp. 1249, 1302).

In *Miller*, the Court settled upon minimal, factual guidelines for describing obscene material. The constitutional test was whether:

"(a) [T]he average person, applying 'contem-

porary community standards' would find that the work, taken as a whole, appeals to the prurient interest;

"(b) the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and,

"(c) the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."
Miller v. California, 413 U. S. at _____, 37 L. Ed. 2d at 431, 93 S. Ct. at 2615. In addition, with respect to part (b) of the above test, the Court gave examples of permissible statutory definition:

"(a) Patently offensive representations or depictions of ultimate sexual acts, normal or perverted, actual or simulated."

"(b) Patently offensive representations or depictions of masturbation, excretory functions, and lewd exhibition of the genitals."

The definition of obscenity under Georgia statutory law is as follows: "Material is obscene if considered as a whole, applying community standards, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and utterly without redeeming social value and if, in addition, it goes substantially beyond customary limits of candor in describing or representing such matters . . . ." Ga. L. 1968, pp. 1249, 1302, as amended; Ga. Code Ann. § 26-2101 (b). In the past, this court has defined and described conduct as obscene within the meaning of the Georgia statute in substantially the same language as that suggested by the Supreme Court in *Miller*. In *Evans Theatre Corp. v. Slaton*, 227 Ga.

377, 379 (180 SE2d 712) (1971), we dealt with depictions of "acts of sexual intercourse, natural, unnatural, bizarre, and violent." In *Walter v. Slaton*, 227 Ga. 676, 680 (182 SE 2d 464) (1971), the films were of "actual sexual activity, both natural and unnatural," which included sexual intercourse, fellatio and cunnilingus. For a similar description of obscene material, see *1024 Peachtree Corp. v. Slaton*, 228 Ga. 102 (184 SE2d 145) (1971). These decisions are, in effect, interpretations of that portion of the Georgia statutory definition providing that material "is obscene if . . . its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion . . ." Code Ann. § 26-2101 (b). These cases specifically "limit" the phrase they interpret, and a fair reading of them leads to the conclusion that the Georgia statute was designed to reach only "hard-core pornography," outside of First Amendment protection. *Slaton v. Paris Adult Theatre I*, 228 Ga. 343, 347 (185 SE2d 768) (1971). They reflect substantially the same descriptive language as that used in the examples of the Supreme Court in *Miller*: "Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated . . . (and) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals." 314 U. S. ——, 37 L. Ed. 2d at 431, 93 S. Ct. at 2615.

We, therefore, conclude that the Georgia statute has been specifically delineated in a manner consistent with the new *Miller* standards. In rejecting counsel's constitutional challenge to the statute we therefore reaffirm our prior ruling that it is not overly broad or vague in definition. *Gornto v. The State*, 227 Ga. 46

(178 SE2d 894) (1970); see *Gable v. Jenkins*, 309 F. Supp. 998 (N. D. Ga. 1969), *aff'd. per curiam*, 397 U. S. 592 (1970) and noted in *Paris Adult Theatre I v. Slaton*, supra, 413 U. S. at _____, N. 1, 37 L. Ed. 2d at 453, N. 1, 93 S. Ct. at 2642, N. 1.

II

DUE PROCESS

The appellees contend that the Georgia statute as construed cannot be applied retroactively and that any detriment found in the *Miller* guidelines, as opposed to the prior *Memoirs* guidelines (Memoirs v. Massachusetts, 383 U. S. 413 (1966)), upon which Ga. Code Ann. § 26-2101 (b) is based, cannot be imposed upon them save in violation of due process of law.

The reply to this argument is that the Georgia statutory definition has been previously authoritatively construed by this court to include those standards for obscenity as permitted by *Miller*. In addition, the *Miller* guidelines allow a State to regulate material lacking in serious literary, artistic, political or scientific value, whereas under the *Memoirs* test (Ga. Code Ann. § 26-2101 (b)) the material also must be shown to be "utterly without redeeming social value." See *Jenkins v. State*, 230 Ga. 726 (SE2d) (1973). Thus, the *Memoirs* test, as construed to include standards offering greater protections to free speech and expression than those in *Miller*, is fully applicable to the pre-*Miller* defendant. See *United States v. Thevis*, No. 71-2614 (5th Cir., decided September 12, 1973); cp. *People v. Enskot*, 13 Cr. L. Rptr. 2522 (Cal. Ct. App. 2d Dist. August 8, 1973), and *United States v.*

1 Reel of Film, 481 F2d 206 (1st Cir. 1973). There can be no serious question that the appellees have been afforded the benefits of this, the *Memoirs*, test, and that their situation has not been substantially altered by the application of the standards of *Miller*, already prevailing in this State under statutory and decisional law.

In summary, this court has previously construed the statutory definition of obscenity in a manner authorized by the new *Miller* guidelines and therefore has not judicially enlarged Ga. Code Ann. § 26-2101 (b). The cases cited by the appellees which prohibit such practice, *Rabe v. State*, 405 U. S. 313 (1972), and *Bouie v. Columbia*, 378 U. S. 347 (1964), are not in point. There has been no unconstitutional, subsequent, contraction of an overly-broad statute to save its application retroactively. cp. *Cox v. New Hampshire*, 312 U. S. 569 (1941), and *Shuttlesworth v. Birmingham*, 394 U. S. 147 (1969).

III

STANDARDS

In *Miller v. California*, supra, the Supreme Court clarified the "community standards" to which the obscenity guidelines were to apply, disavowing that of the nationwide community in favor of that of the state. 413 U. S. at _____, 37 L. Ed. 2d at _____, 93 S. Ct. at 2618-20. In view of *Miller* and of the constitutional responsibility placed upon this court to conduct independent appellate determinations of the issue of obscenity *vel non*, we hold the "community" by

which the standards for obscenity are gauged is that community or polity which is the State of Georgia.

Secondly, it is also no longer necessary in cases where the materials themselves are available for inspection by the finder of fact that expert testimony be produced on behalf of the prosecution. *Paris Adult Theatre I v. Slaton*, 413 U. S. at _____, 37 L. Ed. 2d at 456, 93 S. Ct. at 2634. See, also, *United States v. Groner*, 479 F2d 577 (5th Cir. 1973).

Thirdly, the Supreme Court has rejected the ruling of the trial court in *Paris Adult Theatre I v. Slaton*, supra, that exhibition of obscene material or film to consenting adults is constitutionally permissible. The Court stated, "We categorically disapprove the theory, apparently adopted by the trial judge, that obscene, pornographic films acquire constitutional immunity from state regulation simply because they are exhibited for consenting adults only. This holding was properly rejected by the Georgia Supreme Court." 413 U. S. at _____, 37 L. Ed. 2d at _____, 93 S. Ct. at 2635.

And finally, under the standards announced by the Supreme Court in *Miller*, inhering in prior judicial decisions of this court, and taken in conjunction with Ga. Code Ann. § 26 - 2101 (b), the basic guidelines for determining whether materials or films are obscene in Georgia may be stated substantially as follows:

Applying contemporary community standards and considering the material or film as a whole, the average person would find:

(a) its predominant appeal is to a prurient interest in sex;

(b) the material or film is a patently offensive depiction or description of sexual conduct, embodying a shameful or morbid interest in nudity, sex or excretion, and going substantially beyond customary limits of candor in describing or representing such matters;

(c) the material or film taken as a whole lacks serious literary, artistic, political or scientific value; and,

(d) the material or film taken as a whole is utterly without redeeming social value.

IV

CONCLUSION

In the instant case, the films "It All Comes Out in the End" and "Magic Mirror" depicted actors cavorting indiscriminately in the nude, in a manner designed to appeal to the prurient interests; they depicted simulated acts of intercourse and fellatio. This court has already found these films obscene. In *Slaton v. Paris Adult Theatre I*, 228 Ga. 343, 347 (185 SE2d 768) (1971), we said: "The films in this case leave little to the imagination. It is plain what they purport to depict, that is, conduct of the most salacious character."

We affirm our original decision. The court has again conducted an independent appellate review of the films, and they have been exhibited to those members of the court now sitting who did not participate in the prior ruling. These members have likewise

concluded that the films are obscene under the above standards. The judgment of the trial court is, therefore, reversed with direction that it enter an order permanently enjoining the exhibition of the films.

Judgment reversed with direction. All the Justices concur.

In the Supreme Court of Georgia

26631. SLATON, et al.
v. PARIS ADULT THEATRE I, et al.

GUNTER, Justice (concurring specially). I concur in the Court's judgment of reversal today solely because I consider that I am bound by the majority decisions of the Supreme Court of the United States in Paris Adult Theatre I v. Slaton, supra, and Miller v. California, supra, rendered June 21, 1973.

Were it not for those two recent decisions I would hold that the Georgia statute (Code § 26 - 2101) which permits the State to suppress "obscene materials" is vague and overly broad so as to be constitutionally unenforceable.

While I do not consider the First Amendment to be absolute, it is my view that First Amendment proscriptions, made applicable to Georgia by the Fourteenth Amendment, do not permit the State to suppress expression unless such suppressed expression is clearly defined by the State so that a reasonable man can see the line of demarcation between protected expression and suppressed expression. The definition of "obscene materials" that may be suppressed by the State, con-

tained in the present Georgia statute, does not, to my mind, come even close to establishing that line of demarcation. A reasonable man or, for that matter, seven supposedly reasonable judges, utilizing objective criteria which in the last resort end up being really subjective criteria, cannot distinguish constitutionally protected material from material that is unprotected by the First Amendment.

The net result of the Miller (obscenity concept) case is that this Court acts as a seven-man board of censors in the state of Georgia, and the Supreme Court of the United States acts as a nine-man board of censors throughout the nation, with a majority of this Court determining what is constitutionally protected or unprotected in Georgia and a majority of the Justices of the Supreme Court of the United States determining what is constitutionally protected or unprotected at the national level. As Mr. Justice Brennan so aptly put it in his dissenting opinion in Paris Adult Theatre I: "The problem is, rather, that one cannot say with certainty that material is obscene until at least five members of this Court, applying inevitably obscure standards, have pronounced it so." See also the decision of this Court in Jenkins v. The State, Ga. , SE 2d (1973).

However, because of the majority decisions in Miller v. California and Paris Adult Theatre I v. Slaton, supra, I am required to hold that the present Georgia statute defining obscene material that may be suppressed by the State is not a constitutionally vague and over broad statute.

I therefore concur in the judgment of reversal.

CERTIFICATE OF SERVICE

I hereby certify that I have served copies of this Appellant's Reply to Appellee's Motion to Dismiss or Affirm upon counsel for Appellee, Mr. Carter Goode, Fulton County Courthouse, Atlanta, Georgia 30303, and Mr. Tony H. Hight, Suite 406, 501 Pulliam Street, Atlanta, Georgia 30312, by depositing copies of said Appellant's Reply to Appellee's Motion to Dismiss or Affirm in the United States Mail properly addressed with sufficient postage thereon to insure delivery.

I hereby certify that all parties required to be served have been served.

This .... day of November, 1973.

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[redacted]

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

NO. 72-6257

BILLY JENKINS,
Appellant,

v.

STATE OF GEORGIA,
Appellee.

On Appeal from the Supreme Court of Georgia

BRIEF FOR APPELLANT

[redacted]

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

NO. 73-557

BILLY JENKINS,
Appellant,

v.

STATE OF GEORGIA,
Appellee.

On Appeal from the Supreme Court of Georgia

BRIEF FOR APPELLANT

OPINIONS BELOW

The three opinions filed in the Supreme Court of Georgia (a majority opinion and two dissenting opinions) are reported as *Jenkins* v. *State*, 230 Ga. 726, 199 S.E.2d 183 (July 2, 1973). They are reprinted in the Joint Appendix, pages 52-68.

JURISDICTION

The judgment of the Supreme Court of Georgia was entered on July 2, 1973. Notice of appeal to this Court was filed on September 20, 1973. The Jurisdictional Statement was filed on September 27, 1973. Probable jurisdiction was noted on December 10, 1973. The jurisdiction of this Court rests upon 28 U.S.C. §1257(2).

STATUTES INVOLVED

Georgia Code Ann.

§26-2105 Plays, night club acts, motion pictures, television productions or other exhibitions

(a) Every person who, during the course of a play, night club act, motion picture, television production or other exhibition, or mechanical reproduction of human conduct, engages in conduct which would be public indecency under section 26-2011 if performed in a public place, shall be guilty of participation in indecent exposure and upon conviction shall be punished as for a misdemeanor.

(b) Every person who procures, counsels or assists any person to engage in such conduct or who knowingly exhibits or procures, counsels or assists in the exhibition of a motion picture, television production of other mechanical reproduction containing such conduct shall be guilty of a misdemeanor.

[Georgia Laws 1971 Session, pp. 344, 345, effective April 1, 1971]

§26-2011 Public Indecency

A person commits public indecency when he performs any of the following acts in a public place and upon conviction shall be punished as for a misdemeanor:

(a) An act of sexual intercourse;

(b) A lewd exposure of the sexual organs;

(c) A lewd appearance in a state of partial or complete nudity;

(d) A lewd caress or indecent fondling of the body of another person.

[Georgia Laws 1968 Session, pp. 1249, 1301; effective July 1, 1969]

Georgia Code Ann.

§26-2101 Distributing Obscene Materials

***

(b) Material is obscene if considered as a whole, applying community standards, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and utterly without redeeming social value and if, in addition, it goes substantially beyond customary limits of candor in describing or representing such matters. Undeveloped photographs, molds, printing plates and the like shall be deemed obscene notwithstanding that processing or other acts may be required to make the obscenity patent or to disseminate it.

(c) Material, not otherwise obscene, may be obscene under this section if the distribution thereof, deemed or the offer to do so, or the possession with the intent to do so is a commercial exploitation of erotica solely for the sake of their prurient appeal.

***

[Georgia Laws 1968 Session, pp. 1249, 1302; effective July 1, 1969]

QUESTIONS PRESENTED

I. Whether the film "Carnal Knowledge" is obscene.

II. Whether Georgia Code Ann. §26-2105 is unconstitutional on its face, as applied, and as construed by the Supreme Court of Georgia.

III. Whether it is constitutionally permissible to employ "local," as distinguished from statewide, contemporary community standards in evaluating the prurient interest appeal and patent offensiveness of allegedly obscene material.

IV. Whether Appellant was denied due process of law in the proceedings below, including those in the Supreme Court of Georgia.

STATEMENT

A. Statutory Background

Because of the disparate Georgia laws which were involved in the proceedings below, it is important to outline briefly the statutory scheme surrounding the instant appeal.

In 1968, the Georgia Legislature enacted Georgia Laws 1968, pp. 1249, 1302, which became effective on July 1, 1969 (Georgia Code Ann. §26-2101.) This provision prohibits the distribution of obscene material. §26-2101(b) defines obscenity in terms substantially identical to the plurality *Memoirs* formulation.[1] §26-2101(c) provides that non-obscene material may be

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[1] *Memoirs* v. *Massachusetts*, 383 U.S. 413, 418 (1966) (plurality opinion).

Cases of various types involving §26-2101(b) have been before this Court several times. *Gable* v. *Jenkins*, judgment affirmed, 397 U.S. 592 (1970) (per curiam); *Johnnie Reb's Book & Card Shop* v. *Slaton*, affirmed, 401 U.S. 985 (1971); *Gornto* v. *Georgia*, cert. denied, 402 U.S. 933 (1971); *Evans Theatre Corporation* v. *Slaton*, cert. denied, 404 U.S. 950 (1971); *Walter* v. *Slaton*, cert. denied, 404 U.S. 1003 (1971); *Paris Adult Theatre I* v. *Slaton*, vacated and remanded, 413 U.S. 49 (1973).

obscene if it is exploited for the sake of appealing to the prurient interest, or if it is possessed by any person with the intent to so exploit it.

Also in 1968, the Georgia Legislature enacted Georgia Laws 1968, pp. 1249, 1301, which became effective on July 1, 1969 (Georgia Code Ann. §26-2011). This provision enumerates certain acts which are punishable as "public indecency" if performed "in a public place." §26-2011 is a statute of the type commonly referred to as "indecent exposure" laws.

In 1971, the Georgia Legislature enacted Georgia Laws 1971, pp. 344, 345, which became effective on April 1, 1971 (Georgia Code Ann. §26-2105). This provision flatly prohibits the performance in motion pictures and other forms of expression of acts which would constitute "public indecency" under §26-2011. §26-2105 neither contains nor implies the concept of obscenity, nor does it in any way refer to the obscenity law described above.

For the sake of clarity, these provisions are sometimes referred to in this Brief as §26-2101(b) (obscenity), §26-2101(c) ("pandering" or intent to pander), and §26-2105 (exhibition of a film portraying acts which would constitute "public indecency").

B. The Instant Case

"Carnal Knowledge" is a motion picture which was acclaimed critically as one of the "10 Best" films of the year 1971 (JA 24, 59).[2] Actress Ann-Margret

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[2] "JA" stands for the Joint Appendix filed simultaneously with this Brief in accordance with Rule 36 of the Rules of this Court.

received an Academy Award nomination for her performance (JA 24). The film enjoyed popular acceptance throughout the nation, including many cities and towns within the State of Georgia (JA 24, 59).

Appellant, Billy Jenkins, manager and president of the Broad Avenue Cinema in Albany, Georgia, was exhibiting "Carnal Knowledge" on January 13, 1972, when an investigator in the Dougherty County Sheriff's Office seized the film pursuant to a search warrant he had executed after consultation with the District Attorney (JA 16).[3]

Jenkins was subsequently arrested pursuant to a warrant which charged him with violating Georgia Code Ann. §26-2105 (exhibition of a film portraying acts which would constitute "public indecency") (JA 5-6).[4]

Jenkins was formally accused on March 6, 1972 (JA 7-8).[5] The accusation employed the general chap-

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[3]The seizure of the film and its continued detention throughout the proceedings below clearly violated both First and Fourth Amendment standards. *Heller* v. *New York*, 413 U.S. 483 (1973); *Roaden* v. *Kentucky*, 413 U.S. 496 (1973). However, Appellant did not object to the introduction of the film as evidence and, accordingly, the seizure issue is not before this Court on this appeal.

[4]Although the arrest warrant was dated February 10, 1972 (JA 5), it was not docketed in the Dougherty County Superior Court until March 6, 1972 (JA 3).

[5]The accusation also named a co-defendant, Whitfield Woodall, but the case was subsequently nol prossed as to him (JA 3).

ter heading for Georgia Code Ann. Ch. 26-21 ("distributing obscene material"),[6] but specified the charge against Jenkins *only* with selected language from Georgia Code Ann. §§26-2105 and 26-2011, stating that he did:

> knowingly exhibit a motion picture to the general public which motion picture contained conduct showing (a) an act of sexual intercourse, (b) a lewd exposure of the sexual organs, (c) a lewd appearance in a state of partial or complete nudity, (d) a lewd caress or indecent fondling of another person [JA 8].

On March 20, 1972, Jenkins demurred to the accusation (JA 9). Among the six grounds of the demurrer were challenges to the constitutionality of Georgia Code Ann. §26-2105 on its face and as applied to him (JA 9-11). On the same day, the trial judge overruled each and every ground of the demurrer without comment (JA 13).

Jenkins was tried in the Dougherty County Superior Court on March 22 and 23, 1972. The prosecutor

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[6]Although it bears the general heading "Distributing Obscene Materials," Ch. 26-21 comprises separate and distinct provisions dealing with obscenity and pandering (§26-2101); the unsolicited mailing of explicit sexual material (§26-2102); use of premises so as to constitute a public nuisance (§26-2103); obscenity and advertising therefor declared to be contraband (§26-2104); portraying acts which would constitute "public indecency" (§26-2105); and a severability provision (§26-2106).

Georgia Code Ann. §26-2011 ("public indecency"), which is incorporated into §26-2105, appears in Georgia Code Ann. Ch. 26-20 ("Sexual Offenses").

introduced as evidence only the film "Carnal Knowledge," which was viewed by the jury, and then rested (R. 5, 22).[7] Jenkins introduced testimony about another film showing in Albany, as well as copies of explicit sexual books and magazines then available for purchase in Albany (R. 5, 23-46).

The trial judge's instructions to the jury noted that the State's contentions lay in the accusation (JA 26), which charged only a violation of Georgia Code Ann. §26-2105 (exhibition of a film portraying acts which would constitute "public indecency"). Nevertheless, the instructions encompassed, along with §26-2105, the separate and distinct offenses defined by §26-2101(b) (obscenity)[8] and §26-2101(c) ("pandering" or intent to pander) (JA 30-31).

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[7]As certified by the Clerk of the Supreme Court of Georgia on August 14, 1973, the Record below includes five separate documents, numbered as follows: (1) Opinion of the Supreme Court of Georgia; (2) Remittitur of the Supreme Court of Georgia; (3) Enumeration of Errors filed in the Supreme Court of Georgia; (4) Trial Court Clerk's Record; and (5) Trial Court Reporter's Transcript. Accordingly, as employed herein, a record reference such as "R. 5, 22" refers to the Record in the Supreme Court of Georgia, Document No. 5, page 22.

A copy of the Record in the Supreme Court of Georgia, which also includes a print of the film "Carnal Knowledge" and the books and magazines introduced by Jenkins at the trial, is on file with the Clerk of this Court.

[8]In connection with §26-2101(b), the jury was instructed to apply "community standards" to measure the obscenity of the film (JA 30). It is apparent from the Record that "local" community standards were thus involved, *not* statewide or national standards. See Appellant's Enumeration of Errors in the Supreme Court of Georgia (JA 48); Brief of Appellant in the Supreme Court of Georgia, page 10; Brief of Appellee

On March 23, 1972, the jury returned a general verdict of guilty (JA 38). Jenkins was fined $750.00 and sentenced to 12 months' probation (JA 40-41).

Jenkins appealed the judgment to the Supreme Court of Georgia, arguing that §26-2105 was unconstitutional on its face and as applied to him; that he was denied due process of law; that "local" community standards could not constitutionally be employed; and that the film "Carnal Knowledge" is not obscene in any case (Appellant's Enumeration of Errors in the Supreme Court of Georgia, JA 46-51).

On June 21, 1973, this Court announced its decisions in *Miller v. California*, 413 U.S. 15 (1973), and companion cases. On July 2, 1973, without hearing oral argument, the Supreme Court of Georgia affirmed the conviction of Billy Jenkins by a vote of 4-3. *Jenkins v. State*, 230 Ga. 726, 199 S.E.2d 183 (1973) (JA 52).

The Supreme Court of Georgia characterized the "threshold question" as being "whether or not the showing of the film Carnal Knowledge violates [Georgia] Code Ann. Ch. 26-21 prohibiting the distribution of obscene materials" (JA 52). Although Jenkins had been charged only with a violation of §26-2105 (exhibition of a film portraying acts which would constitute "public indecency") and although that provision does not mention the word "obscene," the Supreme Court of Georgia held that it should be "construed together" with §26-2101(b) (obscenity) and that, as so construed, it could be applied in accordance with "local" com-

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in the Supreme Court of Georgia, pages 4-5. (Copies of the briefs in the Supreme Court of Georgia are on file with the Clerk of this Court.)

munity standards (JA54). On the basis of this rationale, the Court concluded that the statute was constitutional; that the trial judge's instructions to the jury were "proper"[9]; and that, having viewed the film, Appellant's conviction should be affirmed (JA52-55).

The dissents in the Supreme Court of Georgia expressed surprise and shock that "Carnal Knowledge" could be denied First Amendment protection under *any* constitutional formula (Gunter, J., dissenting, JA56; Hawes, J., dissenting, JA67). According to Justice Gunter, the majority's finding that the film was obscene "teaches me that the 'alarm of repression' was validly sounded" by the four Justices of this Court who dissented in *Miller* and its companion cases (JA 64).

Both dissents also considered the majority's use of *Miller* to be a violation of due process, since Appellant's conviction was affirmed under legal standards altogether different from and less exacting than those which existed at the time the offense allegedly was committed (Gunter, J., dissenting, JA56-61; Hawes, J., dissenting, JA67).

Justice Gunter also disagreed with the majority's construction of §26-2105, which he maintained was "patently unconstitutional" and incapable of rehabilitation (JA65).

Justice Undercofler also dissented, but did not file an opinion.

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[9]The Supreme Court of Georgia's opinion does not expressly mention the fact that the trial judge's instructions to the jury included Georgia Code Ann. §26-2101(c) ("pandering" or intent to pander). It does, however, expressly hold that the trial judge's instructions were "proper."

SUMMARY OF ARGUMENT

I. *The film "Carnal Knowledge" is not obscene.* The Supreme Court of Georgia's 4-3 decision holding "Carnal Knowledge" obscene clearly violates the First Amendment, since the film cannot be found obscene under *any* constitutional formula. If the film itself is the best evidence of what it represents, then a viewing of "Carnal Knowledge" clearly shows that it has serious literary and artistic value, and therefore is not obscene. Whether a particular work possesses serious literary and artistic value depends upon the work's intrinsic merits, and has nothing whatsoever to do with community standards.

In addition, even if "Carnal Knowledge" were devoid of literary and artistic value, it would still not be obscene because it does not appeal to the prurient interest and does not portray sexual conduct in a patently offensive way. The Supreme Court of Georgia's decision to the contrary seriously distorts the intended reach of this Court's obscenity decisions of June 21, 1973.

II. *Georgia Code Ann. §26-2105 is unconstitutional on its face, as applied and as construed by the Supreme Court of Georgia.* The trial judge's instructions to the jury in this case encompassed three separate and distinct statutory provisions, all of which were unconstitutional as applied: Georgia Code Ann. §26-2105 (exhibition of a film portraying acts which would constitute "public indecency") was void for overbreadth; Georgia Code Ann. §26-2101(b) (obscenity) was void because it was not limited in application to portrayals of specific sexual conduct and was applied in accord-

ance with "local" community standards; and Georgia Code Ann. §26-2101(c) ("pandering" or intent to pander) was void because it was not limited in application to "close cases" and was also impermissibly vague.

Moreover, in affirming Appellant's conviction on the basis of its holding that §§ 26-2105 and 26-2101(b) were to be "construed together," the Supreme Court of Georgia rendered §26-2105 hopelessly void for vagueness. As of July 2, 1973, it is impossible to determine, for example, to what depictions or descriptions of sexual conduct §26-2105 applies; by what penalty provision its application is governed; and whether it will be applied in accordance with statewide or "local" community standards. In addition, the Supreme Court of Georgia's failure to define the geographic scope and nature of the "local" communities by whose standards films and other material may be evaluated makes those standards impermissibly vague.

III. *It is constitutionally impermissible to employ "local," as distinguished from statewide, community standards in evaluating the prurient interest appeal and patent offensiveness of allegedly obscene material.* The Supreme Court of Georgia's holding that it is permissible to employ "local" standards violates the First Amendment, because it is impermissible in any case to employ "local," as distinguished for statewide, community standards in evaluating the prurient interest appeal and patent offensiveness of allegedly obscene material. *First*, application of thousands upon thousands of "local" standards creates a substantial "chilling effect" and also imposes a burden on interstate commerce which is considerably more than "incidental." In addition, and most importantly, when a determination of obscenity made on the basis of "local"

standards is affirmed by the highest court of a state, that decision inevitably and effectively deters sale or exhibition of the material involved throughout the state. *Second*, "local" standards are unworkable in adjudicating obscenity cases because they will confront this Court and other courts with impossible problems in determining what constitutes an appropriate "local" community. Accordingly, this Court should hold that the community standards applicable under state obscenity laws must be at least statewide in scope.

IV. *Appellant was denied due process of law in the proceedings below, including those in the Supreme Court of Georgia.* The trial judge's instructions to the jury in this case encompassed three separate, distinct and substantially different statutory provisions, even though Appellant had been accused of violating only one of them. Since there is a substantial possibility that the jury's general verdict of guilty was infected by these instructions, Appellant's conviction must be reversed because of possible conviction upon a charge not made and because the instructions included a charge ("pandering" or intent to pander) for which there was absolutely no evidentiary support. Moreover, Appellant's conviction must be reversed because all three of the statutory provisions possibly underlying his conviction were unconstitutional. Furthermore, by holding that §§26-2105 and 26-2101(b) were to be "construed together," the Supreme Court of Georgia deprived Appellant of due process of law by affirming his conviction on the basis of its retroactive application of a statutory construction which was altogether unforeseen and unforeseeable. Finally, the Supreme Court of Georgia also deprived Appellant of due process of law insofar as it departed from certain well-established Georgia precedents in affirming his conviction.

ARGUMENT

I.

THE FILM "CARNAL KNOWLEDGE" IS NOT OBSCENE

This Court "must always remain sensitive to any infringement on genuinely serious literary, artistic, political, or scientific expression." *Miller* v. *California*, 413 U.S. 15, 23 (1973). The *Miller* decision emphasized the need for shielding serious literary and artistic works from overzealous prudery while at the same time denying protection to "hard core pornography." This Court's "independent review of constitutional claims" therefore continues to be available "when necessary." *Id.* at 25. And, as Justice Gunter said in dissent in the Supreme Court of Georgia, if there is ever to be a case in which such review is necessary, "then the case at bar is the case" (JA62). If not reversed, the Supreme Court of Georgia's decision in this case will set a pattern for repressiveness; creativity would be subjected to inhibiting perils inimical to the universally accepted objective of the First Amendment.

Although this Court's obscenity decisions of June 21, 1973, were expressly directed only against "the public portrayal of hard core sexual conduct for its own sake," *Miller* v. *California*, *supra* at 35,[10] there can

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[10] "Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct. . . . A state offense must also be limited to works which, taken as a whole, appeal to the prurient

be no doubt that those decisions have already had "radiating consequences"[11] which have seriously distorted their intended reach, of which the Supreme Court of Georgia's decision in this case is the most obvious example.[12] If such unintended "radiating consequences" are not to become the norm, then works such as "Carnal Knowledge" must be distinguished from "hard core pornography."[13] "The First Amendment interests here are, therefore, broader than merely those of the film maker, distributor, and exhibitor. . . ." *Interstate Circuit* v. *Dallas*, 390 U.S. 676, 684 (1968). They involve nothing less than "the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences. . . ." *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 390 (1969).

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interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value." *Id.* at 27, 24.

[11]See Bickel, *The Least Dangerous Branch* 140 (1962) for the view that, no matter how carefully circumscribed, decisions such as those rendered by this Court on June 21, 1973, "will have radiating consequences, and that these will be to encourage Comstockian tendencies."

[12]See, e.g., "See No Evil," *Time*, July 16, 1973, page 73, column 2, for the view that the Supreme Court of Georgia's decision in this case finding "as serious a film as *Carnal Knowledge*" to be obscene "indicates how drastically the Supreme Court's rules may be interpreted, or misinterpreted, by local authorities trying to decide what may or may not be seen by the public."

See also: "Fears of Local Censorship Haunt the Book Trade," *The New York Times*, January 8, 1974, page 26.

[13]The issue here is obscenity *per se*. Appellant did not permit anyone under the age of 18 years to view the film (JA 24, 25). Nor was there any evidence of "obtrusive" exhibition or, despite the trial judge's instructions, "pandering."

A. The film

"Carnal Knowledge" has been hailed by distinguished critics as a serious work. The film has also been accepted by many millions throughout the nation[14]. It has played in cities large and small, including many within the State of Georgia.[15] Other than in this case, the film has never been held obscene. It is one of the most widely acclaimed films of recent years,[16] and appeared on many "10 Best" lists for 1971,[17] the year in which it was first released. It combines the talents of many of America's leading contemporary artists — e.g., Mike Nichols (producer-director),[18] Jules Feiffer (screen-writer),[19] and Jack Nicholson (actor).[20] The

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[14]*Variety*, January 5, 1972, page 9, lists the film among the 10 most popular for the year 1971.

[15]Including Cordele, Valdosta, Douglas, Macon, Fitzgerald, Savannah, Milledgeville, Augusta, Dalton, Rome, Gainesville, Carlton, and Atlanta (JA 24).

[16]See, e.g., the various reviews cited in Justice Gunter's dissent in the Supreme Court of Georgia (JA 59).

[17]Including *The Oakland Tribune* (Robert Taylor); *The Norfolk Virginian Pilot* (Mal Vincent); *The New York Times* (Vincent Canby); *The Philadelphia Inquirer* (William Collins); *The Boston Sun Advertiser* (Michael Janusonis); *The Nashville Tennesseean* (Harry Haun); *The Cleveland Plain Dealer* (Emerson Batdorff); *The Houston Chronicle* (Jeff Millar); *The Chicago Daily News* (Dond Elliot); *The Denver Post* (Barry Morrison); *The Oregonian* (Ted Mahar); and *Cue* (William Wolf).

[18]Nichols' other films are "Who's Afraid of Virginia Woolf?," "The Graduate," "Catch-22" and "The Day of the Dolphin."

[19]Although noted primarily as a cartoon satirist, Feiffer was also author of the play and later the screenplay for "Little Murders."

[20]Nicholson's other films include "Easy Rider" and "Five Easy Pieces."

film deals with sex, but then sex "has indisputably been a subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern." *Roth v. United States*, 354 U.S. 476, 487 (1957). "[S]ex and obscenity are *not* synonymous." *Ibid.* (emphasis added).

"Carnal Knowledge" is basically "the story of two young men who grow older without growing up"[21] and who, over the course of three decades, "succeed" in driving sex — and with it themselves — into the ground. A brief description of the film is set forth below in portions of a review cited by Justice Gunter in his dissent in the Supreme Court of Georgia (JA 59). (A full copy of this review is contained in an appendix to this Brief.)

> The structure of the film is daring. The time span encompasses more than twenty years from the late 1940s to the late 1960s. We are never given precise dates, but we are oriented, easily enough, by songs on the soundtrack, by styles of dress, by subtle changes in decor . . .
>
> [It is basically a story] of two young college men, roommates and lifelong friends forever preoccupied with their sex lives. Both are first met as virgins. Nicholson is the more knowledgeable and attractive of the two; speaking colloquially, he is a burgeoning bastard. Art Garfunkel is his friend, the nice but troubled guy straight out of those early Feiffer cartoons, but *real*. He falls in love with the lovely Susan (Candice Bergen) and unknowingly shares her with his college buddy.

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[21]Paul D. Zimmerman, *Newsweek*, July 5, 1971, page 71.

As the "safer" one of the two, he is selected by Susan for marriage.

The time changes. Both men are in their thirties, pursuing successful careers in New York. Nicholson has been running through an average of a dozen women a year but has never managed to meet the right one, the one with the full bosom, the good legs, the properly rounded bottom. More than that, each and every one is a threat to his manhood and peace of mind, until at last, in a bar, he finds Ann-Margret, an aging bachelor girl with striking cleavage and, quite obviously, something of a past. "Why don't we shack up?" she suggests. They do and a horrendous relationship ensues, complicated mainly by her paranoidal desire to marry. Meanwhile, what of Garfunkel? The sparks have gone out of his marriage, the sex has lost its savor, and Garfunkel tries once more. And later, ever more foolishly, again.

. . . A cruel film perhaps, but an essentially honest one. Not only is the film, overall, the best-acted in years; it is also the most mature of all those American films that have attempted to deal with the subject of sex in these ultra liberated cinematic times. [Hollis Alpert, *Saturday Review*, July 3, 1971, page 18].

A few excerpts from reviews by leading critics demonstrate the general view of the film as a serious literary and artistic work.

In the end there is no real triumph for the characters. Different attitudes, perhaps, but no triumph . . . . It is a movie that will be controversial

in the heaviest sense of the word, but it is still one of the best that we have had in a long time. [Terry Kay, *The Atlanta Journal*, July 1, 1971, also cited by Justice Gunter, JA 59].

It's a very funny and very cruel and very sad film that marks, for me, Nichols' coming-of-age as a film director. It is the first of his films to have a total and personal style, to use the screen as it has rarely been used heretofore for character study and the probing of personality . . . . Unlike too many of today's films, *Carnal Knowledge* lasts beyond the watching; it sticks to the mind-ribs and bears long retrospection: a feast of a film. [Judith Crist, *New York*, July 5, 1971]

Nichols and Feiffer have made a movie that is not only very funny, but in a casual way — in the way of something observed in a half-light — more profound than much more ambitious films. [Vincent Canby, *The New York Times*, July 1, 1971].

B. "Carnal Knowledge" is not obscene under any constitutional formula

Under Georgia Code Ann. §26-2101(b), the test for obscenity which was retained and applied by the Supreme Court of Georgia in this case (JA53-54), "[m]aterial is obscene if considered as a whole, applying community standards, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in sex or excretion, and utterly without redeeming social value and if, in addition, it goes substantially beyond customary limits of candor in describing or representing such matters."

Under the standard most recently announced by this Court in *Miller* v. *California*, *supra* at 24, the test for obscenity is: "(a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest. . .; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."

The film "Carnal Knowledge" is not obscene under either of these tests, as shown hereinafter.

C. The film is not "utterly without redeeming social value"

The "utterly without redeeming social value" test, retained and applied by the Supreme Court of Georgia in this case, is within constitutional boundaries as *part* of the test of obscenity. There is no clearer basis for reversal in this case than the determination by the Supreme Court of Georgia that "Carnal Knowledge" is obscene under this standard. Whether one agrees or disagrees with the ideas expressed in "Carnal Knowledge," it most definitely is not "utterly without redeeming social value." See, e.g., *Cain* v. *Kentucky*, 397 U.S. 319 (1970) (per curiam); *Bloss* v. *Michigan*, 402 U.S. 938 (1971); *Hartstein* v. *Missouri*, 404 U.S. 988 (1971).

D. The film clearly possesses serious literary and artistic value, and therefore is fully protected by the First Amendment

In *Miller* v. *California*, *supra* at 26, this Court held that a work is fully protected by the First Amendment

if, "[a]t a minimum," it possesses "serious literary, artistic, political, or scientific value." It cannot be doubted that "Carnal Knowledge" possesses the requisite serious literary and artistic value. Indeed, it is far superior in accomplishment, and far less explicit in treatment, than material which this Court has only recently held *not* to be obscene. In *Kois* v. *Wisconsin*, 408 U.S. 229 (1972) (per curiam),[22] this Court had before it a "Sex Poem" which was "an undisguisedly frank play-by-play account of the author's recollection of sexual intercourse." *Id.* at 231. Nevertheless, this Court held that the "Sex Poem" was not obscene because "it bears some of the earmarks of an attempt at serious art." *Ibid.*

At a minimum, "Carnal Knowledge" is much more than merely "an attempt at serious art," and countless film critics have so recognized — e.g., "[t]he best film to date in 1971. The most honest picture ever made of the way American men and women treat each other."[23] Indeed, even those critics who were less than enthusiastic about the film did not question its seriousness. For example, *Catholic Film Newsletter* thought the film as a whole operated too much on the "surface," but noted that it is "at times a perceptive and even brilliant put-down of a life style that reduces human beings to sex organs."[24]

However, the Supreme Court of Georgia, by the narrowest of margins (4-3), held "Carnal Knowledge"

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[22]Although decided in 1972, *Kois* is cited with approval in this Court's decision of June 21, 1973, in *Miller* v. *California*, *supra* at 24-25.

[23]Mary Knoblauch, *Chicago Today*, July 4, 1971.

[24]*Catholic Film Newsletter*, July 30, 1971.

to be obscene. But as Justice Gunter said in dissent (JA 63):

> If the motion picture "Carnal Knowledge" is not entitled to judicial protection under the First Amendment's umbrella, then future productions in this art form utilizing a sexual theme are destined to be obscenely soaked in the pornographic storm.

If the film itself is the best evidence of what it represents, *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 56 (1973), then a viewing of "Carnal Knowledge" clearly shows that it possesses serious literary and artistic value, and therefore is not obscene.[25]

E. The existence of serious literary or artistic value does not depend upon community standards

Serious literary or artistic value is not extinguished by the failure, for whatever reason, of those in a particular community to comprehend or appreciate a work. For example, a serious literary work survives even the illiteracy of the viewer or the reader. The intrinsic merits of a work do not vary from community to community; nor are they controlled by a community's opinions on sex or morality.

"The First Amendment protects works which, taken as a whole, have serious literary, artistic, political, or scientific value, *regardless* of whether the government or a majority of the people approve of the ideas these works represent." *Miller v. California*,

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[25] A print of the film is on file with the Clerk of this Court as part of the Record in the Supreme Court of Georgia.

supra, at 34 (emphasis added). "[F]undamental First Amendment limitations on the powers of the States do *not* vary from community to community." *Id* at 30 (emphasis added). Nothing is more "fundamental" than that the First Amendment fully protects works which possess serious literary or artistic value.

The Supreme Court of Georgia's opinion in this case is so ambiguous that it is impossible to determine what parts of the obscenity test employed in this case were governed by community standards. However, in its most recent obscenity decision, *Slaton v. Paris Adult Theatre I*, — Ga., —S.E.— (Oct. 30, 1973), the Supreme Court of Georgia expressly indicated that *all* parts of the obscenity test, including whether a work possesses serious literary or artistic value, are to be governed by community standards.[26]

To the extent that the Supreme Court of Georgia in this case may have allowed community standards to determine the "value" of "Carnal Knowledge," its judgment must be reversed for this reason also.

Although the fact that "Carnal Knowledge" has serious literary and artistic value warrants reversal without more, the film's lack of prurient interest appeal and patent offensiveness also independently require reversal.

F. The film does not appeal to the prurient interest

"Carnal Knowledge," taken as a whole, clearly does

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[26]The Supreme Court of Georgia's decision of October 30, 1973, in the *Paris* case is set forth in full as the Appendix to Appellant's Reply to Appellee's Motion to Dismiss or Affirm in this case. See, particularly, pages 9-10 of that Appendix.

not appeal to the prurient interest.[27] A work does not appeal to the prurient interest if it " . . . says more to the mind than to the senses; [if] it awakens emotions attached to problems and ideas, not to bodies." Rosenberg, "Trials of Eros," *The New Yorker*, November 4, 1972, page 121 *et seq.* (at page 126).

Like any serious work of art, "Carnal Knowledge" may be viewed from a multiplicity of perspectives and will mean different things to different people.[28] But whatever else one may say about it, the film is not "material having a tendency to excite lustful thoughts." *Roth v. United States*, *supra* at 487 n. 20. Its purpose and effect is to express ideas about the way some

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[27]Although this Court has recently characterized determinations of prurient interest appeal and patent offensiveness as "essentially questions of fact," *Miller* v. *California*, *supra* at 30, they are nevertheless questions of "constitutional fact." *Kois* v. *Wisconsin*, 408 U.S. 229, 232 (1972) (per curiam). Accordingly, these questions are still subject to independent appellate review because "the duty rests on this Court to decide for itself facts or constructions upon which federal constitutional issues rest." *Kern-Limerick, Inc.* v. *Scurlock*, 347 U.S. 110, 121 (1954).

[28]Not surprisingly, various reviewers have looked at the film in various ways — e.g., a reconsideration of the institution of marriage (Arthur Knight and Hollis Alpert, *Sex in Cinema* 2, 1972); an examination of the perenially adolescent male (Judith Crist, *New York*, July 5, 1971); how people become victims of the life-styles they create for themselves (Terry Kay, *The Atlanta Journal*, July 1, 1971); and the psychic misunderstandings and emotional hurts in male-female relationships (Vincent Canby, *The New York Times*, July 1, 1971). Whatever one's individual view, there is no doubt that the film "does, admittedly, trigger discussion, which means that Nichols has accomplished something" (Kathleen Carroll, New York *Daily News*, July 1, 1971).

people use (and abuse) sexuality. Whether one agrees or disagrees with such ideas, their expression is fully protected by the First Amendment. See, e.g., *Kingsley Pictures Corp. v. Regents*, 360 U.S. 684, 688-689 (1959).

"Carnal Knowledge" contains no more nudity and sex than is justified by their rational relation to its theme. Indeed, the oblique, discreet and very brief manner in which the film portrays its few scenes of nudity and sex belies any intention to exploit them for the sake of appealing to the prurient interest; by ending scenes when their legitimate dramatic point has been made and by careful placement of the camera, the film deliberately avoids any such exploitation. And the film's dialogue, while sometimes blunt, is well within the boundaries of what this Court has already held *not* to be obscene.[29]

The film does not appeal to the prurient interest,[30] and therefore would not be obscene even if it lacked serious literary and artistic value, which it clearly does not.

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[29]*Cohen* v. *California*, 403 U.S. 15 (1971); *Kois* v. *Wisconsin*, 408 U.S. 229 (1972) (per curiam); *Rosenfeld* v. *New Jersey*, 408 U.S. 901 (1972); *Lewis* v. *City of New Orleans*, 408 U.S. 913 (1972); *Brown* v. *Oklahoma*, 408 U.S. 914 (1972); *Cason* v. *City of Columbus*, 409 U.S. 1053 (1972); *Papish* v. *University of Missouri Curators*, 410 U.S. 667 (1973) (per curiam); *Hess* v. *Indiana*, — U.S. — (November 19, 1973) (per curiam).

[30]*The Atlanta Journal*, July 1, 1971, summarized the film in the following capsule comment: "*Journal* Guide — Sex, plenty but not in the hard-core sense; Violence, some emotional but not physical; Nudity, a few expressive scenes; Language, rough but not uncommon in certain structures of modern society."

G. The film is not patently offensive

"Carnal Knowledge" does not depict or describe, in a patently offensive way, sexual conduct specifically defined by the applicable Georgia law(s). There is absolutely nothing in the film which even remotely approaches "hard core" status.[31]

Insofar as sexual conduct is concerned, it is impossible to determine exactly what portion (or portions) of the film might have been considered offensive by the jury, which returned only a general verdict of guilty. As applied in this case, the trial judge's instructions encompassed two provisions — Georgia Code Ann. §§ 26-2101(b) (obscenity) and 26-2101(c) ("pandering" or intent to pander) — which do not even mention specific sexual conduct. In addition, the Supreme Court of Georgia's opinion did not mention any specific sexual conduct portrayed in the film, nor did it even allude to the *Miller* requirement that obscenity statutes must be limited in application to specifically defined depictions or descriptions of sexual conduct.

In any case, as Justice Hawes remarked in dissent in the Supreme Court of Georgia, "the film under consideration here is *not* the kind of hard-core pornography we removed from public consumption" in *Slaton v. Paris Adult Theatre I*, 228 Ga. 343, 185 S.E.2d 768 (1971), vacated and remanded, 413 U.S. 49 (1973) (JA67; emphasis added).

Moreover, given testimony at the trial about the availability of more explicit material in Albany (R. 5,

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[31] See footnote 28, *supra*.

23-46) and given the fact that "Carnal Knowledge" was shown widely and without opposition throughout the State of Georgia, there is substantial doubt as to whether the jury, which returned only a general verdict of guilty, actually did or could have found the film to be patently offensive.

Under these circumstances, whatever weight this Court might otherwise be disposed to accord to jury determinations on this issue cannot apply here, particularly since a finding that "Carnal Knowledge" is patently offensive would be "wholly out of step with current American standards." *Memoirs v. Massachusetts*, 383 U.S. 413, 458 (1966) (dissenting opinion of Harlan, J.).

II.

GEORGIA CODE ANN. §26-2105 IS UNCONSTITUTIONAL ON ITS FACE, AS APPLIED, AND AS CONSTRUED BY THE SUPREME COURT OF GEORGIA

A. The statute is invalid on its face for overbreadth

Motion pictures are a form of expression protected by the First Amendment. *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495, 502 (1952). A particular film may be suppressed completely only if it is found to be obscene. *Paris Adult Theatre I* v. *Slaton, supra; Jacobellis* v. *Ohio*, 378 U.S. 184 (1964).

On its face, Georgia Code Ann. §26-2105 imposes an absolute prohibition against exhibition of motion

pictures which portray any of the acts enumerated in Georgia Code Ann. §26-2011, the State's "public indecency" law. This *per se* prohibition operates "across the board," cf. *California* v. *LaRue*, 409 U.S. 109, 118 (1972), totally without regard to whether films portraying such acts are obscene. To the extent that it may even be considered an "obscenity" law, §26-2105 makes sex and obscenity synonymous. Cf. *Roth* v. *United States*, *supra* at 487.

For example, §26-2105 flatly prohibits exhibition of any film containing a scene showing "A lewd appearance in a state of partial or complete nudity," even if such a scene lasts only 10 seconds in a two-hour film; even if the scene is rationally related to the theme of the film as a whole; even if the film neither appeals to the prurient interest nor is patently offensive; and even if the film taken as a whole possesses serious literary and artistic value.

On its face, §26-2105 therefore makes no attempt to "distinguish commerce in ideas, protected by the First Amendment, from commercial exploitation of obscene material." *Miller* v. *California*, *supra* at 36. Its prohibitions are "appallingly overbroad, permitting the suppression of a vast range of literary, scientific, and artistic masterpieces. Neither the First Amendment nor any free community could possibly tolerate such a standard." *Paris Adult Theatre I* v. *Slaton*, *supra* at 94 (dissenting opinion of Brennan, J.).[32]

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[32]The *Paris Adult Theatre* case involved the definition of obscenity set forth in Georgia Code Ann. §26-2101(b). It did not involve §26-2105.

As this Court held in *Cohen* v. *California*, 403 U.S. 15, 26 (1971):

> [W]e cannot indulge the facile assumption that one can forbid particular words without also running a risk of suppressing ideas in the process. Indeed, governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views.

Although this Court has not previously been confronted with the application of "public indecency" or "indecent exposure" laws to motion pictures and other forms of expression, its prior decisions make it clear that, outside of the constitutionally established exceptions, such as obscenity, "governmental bodies may not prescribe the form or content of individual expression." *Cohen* v. *California*, *supra* at 24. If governments may not censor "particular words as a convenient guise for banning the expression of unpopular views," neither may they prohibit film portrayals of certain conduct for the same purpose.[33]

A law such as Georgia Code Ann. §26-2105 may not constitutionally be applied to any form of expression. Indeed, numerous lower courts have already so held with respect to similar laws. See, e.g., *P.B.I.C.*,

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[33] §26-2105 is clearly aimed at expression, not conduct. Cf. *United States* v. *O'Brien*, 391 U.S. 367 (1968). Even assuming that §26-2105 evidences only a governmental interest in regulating conduct, the resulting restrictions on First Amendment freedoms are clearly intolerable. *Id.* at 376-377. See *Miller* v. *California*, *supra* at 26 n. 8: "... the States have greater power to regulate nonverbal, physical conduct than to suppress depictions or descriptions of the same behavior." See also: *Schacht* v. *United States*, 398 U.S. 58 (1970).

Inc. v. *Byrne*, 313 F.Supp. 757, 764-765 (D.Mass. 1970) (three-judge court), vacated and remanded to consider mootness, 401 U.S. 987 (1971), affirmed on remand (June 16, 1971), vacated and remanded, 413 U.S. 905 (1973); *Southeastern Promotions, Ltd.* v. *City of Atlanta, Ga.*, 334 F.Supp. 634, 642-643 (N.D. Ga. 1971);[34] *In re Giannini*, 69 Cal.2d 563, 72 Cal. Rptr. 655, 446 P.2d 535, 541 (1968), *cert. denied*, 395 U.S. 910 (1969); *Salem Inn, Inc.* v. *Frank*, 364 F.Supp. 478, 483 (E.D.N.Y. 1973).

On its face, §26-2105 is clearly "susceptible of application to protected expression," *Gooding* v. *Wilson*, 405 U.S. 518, 522 (1972), and is therefore unconstitutional.

B. The statute is invalid as applied

Appellant was charged with and tried for a violation of Georgia Code Ann. §26-2105 (exhibition of a film portraying acts which would constitute "public indecency"). Nevertheless, the trial judge's instructions to the jury encompassed the separate, distinct and

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[34]Although it arose several months after April 1, 1971, the effective date of §26-2105, the *Southeastern Promotions* case involved only Georgia Code Ann. §26-2011 ("public indecency"), which enumerates the acts whose portrayal is prohibited by §26-2105. Since it became effective, §26-2105 has been challenged in two other cases, but the issue of its constitutionality was not reached. *Cooley* v. *Endicator*, 340 F.Supp. 15 (N.D. Ga. 1971), *aff'd per curiam*, 458 F.2d 513 (5th Cir. 1972), *cert. denied*, 409 U.S. 1115 (1973); *Martin Theatres of Georgia, Inc.* v. *Robert W. Reynolds* (U.S.D.C., M.D.Ga., Albany Division, Civil Action No. 1142, filed October 12, 1971, voluntarily discontinued December 1, 1971).

substantially different offenses defined by Georgia Code Ann. §§ 26-2101(b) (obscenity) and 26-2101(c) ("pandering" or intent to pander), as well as §26-2105. Since the jury returned only a general verdict of guilty and since the Supreme Court of Georgia later held that the trial judge's instructions were "proper" (JA 52), the constitutionality of each of these provisions is an issue in this case.[35]

If the jury based its verdict of guilty on §26-2105, Appellant's conviction must be reversed because the statute was clearly void for overbreadth. (See Point II(A), *supra*.)

If the jury based its verdict of guilty on the definition of obscene material contained in §26-2101(b), Appellant's conviction must likewise be reversed. At least as applied in this case,[36] this provision was not limited in application to material depicting or describ-

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[35]As an organizational matter, we have focused our attack on §26-2105, since it is the provision which Appellant was accused of violating and which the Supreme Court of Georgia purported to construe in this case. However, to the extent that they are involved in this case, either at the trial level or in the Supreme Court of Georgia's decision, the constitutionality of §§ 26-2101(b) and 26-2101(c) is also at issue.

[36]The Supreme Court of Georgia's decision of October 30, 1973, in *Slaton* v. *Paris Adult Theatre I*, *supra*, holding that *as of 1971* §26-2101 (b) had already been limited in application to depictions or descriptions of certain sexual conduct, raises questions about the constitutionality of §26-2101(b) on its face which need not be discussed here. For it is clear that the trial judge's instructions to the jury in this case did *not* limit application of §26-2101(b) to the types of sexual conduct described in the *Paris* case (JA 30-31).

ing specifically defined sexual conduct, and was therefore overbroad. *Miller v. California*, *supra* at 27. In addition, §26-2101(b) was invalid insofar as it was applied in accordance with "local" as distinguished from statewide, community standards.[37] (See Points II(C) and III, *Infra*.)

If the jury based its verdict of guilty on §26-2101 (c), Appellant's conviction must also be reversed. This provision is not only hopelessly vague,[38] *Coates* v. *City of Cincinnati*, 402 U.S. 611 (1971); it is also overbroad. While this Court has held that actual "pandering" may be relevant to a determination of obscenity "in close cases," *Ginzburg* v. *United States*, 383 U.S. 463, 474 (1966), §26-2101(c) is not so limited in application, nor was it so limited by the trial judge's instructions to the jury in this case.

In short, the trial judge's instructions to the jury encompassed three separate, distinct and substantially different statutes, all of which were applied unconstitutionally in this case. Appellant's conviction must therefore be reversed.

C. The statute is invalid as construed by the Supreme Court of Georgia

Despite the Supreme Court of Georgia's attempt to rehabilitate it in this case, §26-2105 has not yet been construed "so as to avoid all constitutional difficulties."

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[37] See footnote 8, *supra*.

[38] For example, §26-2101(c) purportedly applies to "erotica," a term which is not defined in the statute itself or in any Georgia case. Indeed, there are no Georgia cases either applying or construing §26-2101(c).

United States v. *Thirty-Seven Photographs*, 402 U.S. 363, 369 (1971); *Gooding* v. *Wilson*, *supra* at 528.

Although the Court held that §§26-2105 and 26-2101(b) should be "construed together" (JA 53), its opinion is "so cryptic and devoid of supportive reasoning that it is impossible to define its parameters." Note, 8 Ga. L. Rev. —, — (1973)[39]

For example:

(1) On its face, §26-2105 applies to material portraying acts defined to constitute "public indecency"[40] — "An act of sexual intercourse," "A lewd exposure of the sexual organs," "A lewd appearance in a state of partial or complete nudity," and "A lewd caress or indecent fondling of the body of another person." As of 1971, however, §26-2101(b) had already been limited in application to material depicting or describing different acts — "acts of sexual intercourse, natural, unnatural, bizarre, and violent" and "actual sexual activity, both natural and unnatural."[41]

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[39]The editors of the Georgia Law Review have furnished Counsel for Appellant with the typewritten text of this Note, which will appear in the next issue, 8 Ga. L. Rev. — (1973). A copy of the typewritten text is being filed simultaneously with this Brief and also is being furnished to Counsel for Appellee. Page 7 of the typewritten text contains the language cited above.

[40]§26-2105 merely prohibits the portrayal in a motion picture of the acts which would constitute "public indecency" under Georgia Code Ann. §26-2011. The acts themselves are enumerated in §26-2011.

[41]*Slaton* v. *Paris Adult Theatre I*, *supra* (October 30, 1973). Since the *Paris* decision purports only to restate the types of acts to which §26-2101(b) had been limited in application

Since the Supreme Court of Georgia held in this case that §§26-2105 and 26-2101(b) must be "construed together," it is impossible to determine whether §26-2105 now applies to the acts specified to constitute "public indecency," *or* to the acts to which §26-2101(b) has applied since 1971, *or* to both types of acts. (Indeed, the Supreme Court of Georgia's opinion in this case, although handed down on July 2, 1973, does not even allude to the *Miller* requirement that obscenity statutes must be limited in application to depictions or descriptions of specifically defined sexual conduct.)

The constitutional problems are only compounded by reference to the respective acts encompassed by §§26-2105 and 26-2101(b). For example, the "lewd appearance in a state of partial or complete nudity" and "lewd caress or indecent fondling of the body of another person" which are encompassed by §26-2105 cannot be considered "examples" of the type of "hard core sexual conduct" which this Court intended to reach in its decisions of June 21, 1973. *Miller* v. *California*, *supra* at 25, 35.[42] Cf. *Hunt* v. *Keriakos*, 428 F.2d 606 (1st Cir. 1970), *cert. denied*, 400 U.S. 929 (1970).

The problem here, in short, is not that citizens are

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as of 1971, it may of course be considered in determining the validity of §26-2105 as construed by the Supreme Court of Georgia in this case on July 2, 1973. Cf. *Wainwright* v. *Stone*, — U.S. — (November 5, 1973) (per curiam).

[42] "(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated. / (b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals." *Id.* at 25.

compelled to " 'steer far wider of the unlawful zone' ... than if the boundaries of the forbidden areas were clearly marked," *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964), quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958); the problem here is that Appellant and other Georgia motion picture exhibitors[43] can't possibly have any notion of what constitute the "forbidden areas."

(2) Another reason why §26-2105 is now unconstitutional is that, on their face, §§26-2105 and 26-2101(b) have separate and different penalty provisions.[44] However, since the two statutes must now be "construed together," it is impossible to determine which penalty provision now governs §26-2105.

(3) Material which is obscene under §26-2101(b) is subject to a special tax.[45] Again, since §§26-2105 and

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[43]Appellant, of course, clearly has standing to challenge the validity of §26-2105 not only as applied to him, but also as it might be applied to others. See, e.g., *Gooding* v. *Wilson*, *supra* at 521; *Coates* v. *City of Cincinnati*, *supra* at 616; *Baggett* v. *Bullitt*, *supra* at 366.

[44]Under §26-2101(d) an initial violation of §26-2101 constitutes a misdemeanor, but any subsequent violations constitute a felony. Under §26-2105, by contrast, both the initial and subsequent violations constitute only a misdemeanor.

[45]Georgia Code Ann. Ch. 92-21A (Georgia Laws 1970 Session, p. 443) imposes a tax of $500.00 on each sale of an obscene item. Since this provision was adopted prior to the enactment of §26-2105 and since §26-2105 on its face neither contains nor implies the concept of obscenity, this special tax clearly was not intended to apply to material proscribed by §26-2105. However, in view of the Supreme Court of Georgia's decision in this case that §§ 26-2101(b) and 26-2105 must be "construed together," this question is not now free of ambiguity.

26-2101(b) must now be "construed together," does this tax now apply to material proscribed by §26-2105?

(4) The Supreme Court of Georgia held that §26-2105 could be applied in accordance with either statewide or "local" community standards. Appellant and other Georgia motion picture exhibitors are therefore left to guess whether, in any possible prosecution, they will be subject to statewide or "local" standards.

Moreover, insofar as "local" standards are concerned, the Supreme Court of Georgia has failed to define either the geographic parameters or nature of the "local" communities by whose standards films and other material will be evaluated. The statute is therefore void for vagueness because it is impossible to determine whether "local" means region, county, city, neighborhood, or whatever. Such uncertainty not only fails to give "fair warning," but also inhibits the exercise of First Amendment freedoms. *Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972). (Moreover, even if they are defined precisely, Appellant believes it is constitutionally impermissible in any case to employ "local," as distinguished from statewide, community standards, and that §26-2105 as construed in this case is invalid for this reason also. Because of the importance of this issue, it is treated as a separate point. See Point III, *infra.*)

In summary, §26-2105 as construed by the Supreme Court of Georgia in this case clearly fails to give persons of ordinary intelligence "fair notice" of exactly what it prohibits and, in addition, encourages arbitrary and erratic arrests and convictions. See, e.g., *Papachristou* v. *City of Jacksonville*, 405 U.S. 156,

162 (1972). And while this Court undertook in *Miller* v. *California*, *supra* at 20, 27, "to formulate standards more concrete than those in the past" so that obscenity laws would "provide fair notice to a dealer in such materials that his public and commercial activities may bring prosecution," the Supreme Court of Georgia's decision in this case has led §26-2105 in exactly the opposite direction — indeed, it is now so vague that Appellant and other Georgia motion picture exhibitors "must necessarily guess at its meaning and differ as to its application." *Connally* v. *General Construction Co.*, 269 U.S. 385, 391 (1926).

III.

IT IS CONSTITUTIONALLY IMPERMISSIBLE TO EMPLOY "LOCAL," AS DISTINGUISHED FROM STATEWIDE, COMMUNITY STANDARDS IN EVALUATING THE PRURIENT INTEREST APPEAL AND PATENT OFFENSIVENESS OF ALLEGEDLY OBSCENE MATERIAL

In *Miller* v. *California*, *supra* at 33-34, this Court held that the trial court's use of the "contemporary standards of the State of California" in evaluating the material in question was "constitutionally adequate." "People in different *States* vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity." *Id.* at 33 (emphasis added). See also: *Kaplan* v. *California*, 413 U.S. 115, 121 (1973).

By so holding, we believe this Court meant only to sanction the use of *statewide* community standards, not

the standards of the countless localities within a state.[46]

Nevertheless, because of a reference in the Court's opinion to Las Vegas and New York City, *Miller* v. *California*, *supra* at 32, as well as a reference in the *Miller* syllabus to the "forum community,"[47] this question has engendered a considerable amount of confusion and conflict.

Some post-*Miller* decisions hold that the applicable community standards may be "local." See, e.g., *Rhodes* v. *State*, 283 So.2d 351, 358 (Supreme Court of Florida, September 19, 1973); *Brazelton* v. *State*, 282 So.2d 342, 343 (Ala.Ct.Crim.App., June 29, 1973). Others hold that the applicable community standards must be statewide in scope. See, e.g., *State* v. *J-R Distributors, Inc.*, 512 P.2d 1049, 1065 (Supreme Court of the State of Washington, July 27, 1973), petition for certiorari pending (No. 73-937); *People* v. *Heller* (New York Court of Appeals, No. 184/71, December 28, 1973). And one court has even held that *both* statewide and "local" standards should be applied. *Richards* v. *State*, 497 S.W.2d 770, 777 (Texas Ct.Civ.App., July 2, 1973).

Commentators are likewise divided on this issue. Compare Leventhal, "The Round of Obscenity-Por-

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[46]See also: *Cain* v. *Kentucky*, 397 U.S. 319 (1970) (per curiam) (dissenting opinion of Burger, C.J.); *Walker* v. *Ohio*, 398 U.S. 434 (1970) (per curiam) (dissenting opinion of Burger, C.J.); *Hoyt* v. *Minnesota*, 399 U.S. 524 (1970) (per curiam) (dissenting opinion of Blackmun, J.). All of these opinions refer to *states*, not localities with a state.

[47]The syllabus, of course, is not part of the Court's opinion. *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337 (1906).

nography Decisions," 59 A.B.A.J. 1261, 1262-1263 (1973) ("local" standards are probably permissible), with Note, 8 Ga.L.Rev. —, — (1973) (community standards must be statewide).

Most strikingly, in Georgia there are now two post-*Miller* decisions by the State's highest court — *Jenkins* v. *State*, *supra* (July 2, 1973) ("local" standards are permissible), and *Slaton* v. *Paris Adult Theatre I*, *supra* (October 30, 1973) (standards must be statewide) — which reach contradictory conclusions as to what community standards may or must be applied.[48]

The Supreme Court of Georgia's failure to define the geographic parameters and nature of the "local" community makes the concept void for vagueness. (See Point II(C), *supra*.)

However, a broader issue is also involved in this case. Appellant believes that, even if the applicable "local" community is defined precisely, it is still constitutionally impermissible to employ "local," as distinguished from statewide, community standards in evaluating the prurient interest appeal and patent offensiveness of allegedly obscene material,[49] and that

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[48]In *Jenkins*, the Supreme Court of Georgia affirmed the conviction of Appellant in this case on the basis of its holding that it was permissible to apply "local" community standards. Accordingly, despite that Court's later decision in *Paris*, the constitutional propriety of "local," as distinguished from statewide, community standards continues to be an issue before this Court in this case.

[49]Applicable community standards do *not* govern determination of whether material lacks serious literary or artistic value. Determination of this issue depends on the material's intrinsic merits, not community standards. See Point I (E), *supra*.

§26-2105 as construed in this case violates the First Amendment for this reason also. Because of the conflict among post- *Miller* decisions on this question, its resolution by this Court would be an essential guide for the future.

(1) If "local" community standards are applied, the most readily apparent consequence is the intolerable "chilling effect" upon creators and distributors who are subjected to thousands upon thousands of "local" community standards. For a national *disseminator* of First Amendment material (e.g., book and magazine publishers, film distributors, etc.) to keep track of and to cope with 50 different state standards is difficult enough, but to do so with thousands upon thousands of "local" standards would be absolutely impossible. Under these circumstances, a "local" standard not only "operates to inhibit the exercise of [First Amendment] freedoms," *Cramp v. Board of Public Instruction*, 368 U.S. 278, 287 (1961), but also imposes a burden on interstate commerce which is considerably more than "incidental". *Cf. Miller v. California*, *supra*, at 32-33 n. 13.

For an *exhibitor* or *seller* of material, application of "local" community standards creates an even stronger "chilling effect." For when a determination of obscenity made on the basis of "local" standards is affirmed by the highest court of a state, that decision and the wide-spread publicity which accompanies it create a devastating impact which effectively deters sale or exhibition of the material involved throughout the state.[50] Since "[p]articularly in the case of motion pic-

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[50]Cf. Coffin, Ch.J., concurring in *United States* v. *One Reel of Film*, 481 F.2d 206, 210-211 (1st Cir., July 16, 1973). Chief

tures, it may take very little to deter exhibition in a given locality" *Freedman* v. *Maryland*, 380 U.S. 51, 59 (1965), exhibitors in *other* localities within the state obviously will not run the risk of criminal prosecution by showing the film involved. As Justice Hawes pointed out in dissent below, the effect of the Supreme Court of Georgia's approval of "local" community standards in this case is:

> . . . . . to place in the hands of the few the tastes and the cultural advancement of the many who are members of the greater state community and to deny in large measure the basic freedoms of individuals to participate as they will in the general commerce of ideas. [JA 67]

What may be seen by the citizens of an entire state should therefore at least be governed by the community standards of the entire state.

(2) Application of "local" standards will also confront this Court and other courts with impossible

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Judge Coffin would hold that "national" community standards must continue to govern obscenity determinations pursuant to 19 U.S.C. §1305, since otherwise the standards of the community surrounding the port of entry would dictate what might be seen across the nation. (The other two judges did not reach this issue. *Id.* at 208 n. 2.)

We do not consider here what community standards should apply in federal obscenity prosecutions, except to note that the current permissibility of intervening district venue, *Reed Enterprises* v. *Clark*, 278 F. Supp. 372 (D.D.C. 1967) (three-judge court), *aff'd per curiam*, 390 U.S. 457 (1968), may raise in federal obscenity cases problems somewhat analogous to those discussed above in connection with state proceedings under state laws.

problems in determining what constitutes an appropriate "local" community. For example, "[i]s a college bookstore governed by the standards of the college community or of the town or county in which the college is located?" Leventhal, "The 1973 Round of Obscenity-Pornography Decisions," *supra* at 1263.

As the Supreme Court of California held several years ago in choosing statewide over "local" standards, *In re Giannini, supra,* 446 P. 2d at 547:

> . . . . . on balance a community comprised of the entire State of California is the more appropriate. This standard avoids administrative problems in determining the exact scope of the smaller community: whether it should be city, county, individual neighborhood within the city, or whatever. Moreover, a strong policy favors uniformity in the application of state criminal law [citation omitted]; we promote this policy by assuring that application of the obscenity law in this state will be based on a uniform "community".

Simply in terms of adjudicating obscenity cases, a "local" standard is completely "unworkable".[51]

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[51] "Community standards must be statewide. If we adopt local standards, are they to be on a city basis, county basis, circuit court basis, or some other basis? Should something be determined not obscene in Milwaukee and yet be obscene in Pepin county? Is there to be a separate standard for metropolitan areas different from rural areas? Are the federal courts in Wisconsin to follow the community standards of the state courts or is there to be one standard in the Eastern District and another in the Western District because the juries are drawn from different districts? If the jury is waived, what then is the area of the local standard? If a national standard

IV.

APPELLANT WAS DENIED DUE PROCESS OF LAW IN THE PROCEEDINGS BELOW, INCLUDING THOSE IN THE SUPREME COURT OF GEORGIA

All of the proceedings below, including those in the Supreme Court of Georgia, are part of the due process of law under which Appellant's conviction must "stand or fall." *Frank* v. *Mangum*, 237 U.S. 309, 327 (1915).

A. Conviction upon a charge not made

"A person's right to reasonable notice of a charge against him . . . [is] basic in our system of jurisprudence." *In re Oliver*, 333 U.S. 257, 273 (1948). "Conviction upon a charge not made would be sheer denial of due process." *Dejonge* v. *Oregon*, 299 U.S. 353, 362 (1937).

Appellant was accused *only* of violating Georgia Code Ann. §26-2105 (exhibition of a film portraying acts which would constitute "public indecency").[52]

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is unworkable, as *Miller* says it is, I find a local standard even more unworkable than national standards." Hallows, C.J., dissenting in part in *State ex rel. Chobot* v. *Circuit Court for Milwaukee County* (Supreme Court of Wisconsin, August Term, 1973, State No. 179, December 10, 1973). (The majority of the Court in the *Chobot* case did not reach the issue of what constitutes the applicable community.)

[52]Under Georgia law, this accusation was binding upon the State. See, e.g., *Wood* v. *State*, 219 Ga. 509, 134 S.E.2d 8 (1963). Indeed, Georgia courts have consistently reversed

Nevertheless, the trial judge's instructions to the jury allowed it to convict him of any one of three separate, distinct and substantially different offenses: §26-2105; §26-2101(b) (obscenity); and §26-2101(c) ("pandering" or intent to pander). Since the jury returned only a general verdict of guilty, it is impossible to determine whether it convicted him of one, two or all three of these offenses.

Therefore, since there is a substantial possibility that the jury's general verdict of guilty was infected by conviction upon a charge not made, Appellant's conviction must be reversed. See, e.g., *Wardius* v. *Oregon*, 412 U.S. 470, 479 (1973).

B. No evidence to support conviction for "pandering"

The trial judge's instructions to the jury included

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convictions based upon jury instructions which deviated even in minor respects from the language of an accusation. See *Bennett* v. *State*, 108 Ga.App. 265, 132 S.E.2d 816 (1963) (accusation was illegal possession of "alcohol," but jury instructions encompassed "alcohol, or any alcoholic compound"); *Campbell* v. *State*, 106 Ga.App. 588, 127 S.E.2d 816 (1962) (accusation employed language from one section of a chapter, but jury instructions encompassed that section plus other sections of the same chapter); *Locklear* v. *State*, 94 Ga.App. 969, 96 S.E.2d 283 (1956) (accusation employed the word "whiskey," but jury instructions employed the word "liquor").

We do not challenge the Supreme Court of Georgia's right to depart from these precedents as a matter of state law. We do, however, challenge its right to do so when, as here, such a departure deprives a defendant of due process of law. In addition to the points discussed in the text above, this is another ground upon which Appellant was denied due process.

§26-2101(c), even though there was not a single word of evidence which even remotely suggested that "pandering" was an issue. Since there is a substantial possibility that the jury's general verdict of guilty was infected by this instruction, Appellant's conviction must be reversed because conviction for "pandering" is so totally devoid of evidentiary support as to violate due process in and of itself. *Thompson* v. *City of Louisville*, 362 U.S. 199 (1960); *Garner* v. *Louisiana*, 368 U.S. 157 (1961); *Gregory* v. *City of Chicago*, 394 U.S. 111, 112 (1969); *Douglas* v. *Buder*, 412 U.S. 430, 432 (1973) (per curiam).

C. Unconstitutionality of statute(s) underlying conviction

Since the trial judge's instructions to the jury encompassed three separate and distinct statutory provisions and since the jury returned only a general verdict of guilty, Appellant's conviction must be reversed as a denial of due process if any one of these provisions was unconstitutional. *Stromberg* v. *California*, 283 U.S. 359, 369-370 (1931). For the reasons set forth above (see Point II (A,B), *supra*), Appellant believes that *all* three provisions were unconstitutional.

D. Retroactive application of an unforeseen and unforeseeable statutory construction

In affirming Appellant's conviction, the Supreme Court of Georgia "performed a remarkable job of plastic surgery upon the face" of §26-2105 (exhibition of a film portraying acts which would constitute "public indecency"), holding that it "really meant some-

thing quite different" from what it clearly said. *Shuttlesworth* v. *City of Birmingham*, 394 U.S. 147, 153-154 (1969).

Indeed, the Supreme Court of Georgia's decision in this case that §§26-2105 and 26-2101(b) (obscenity) were to be "construed together" was wholly unforeseen and unforeseeable.[53] A reading of these provisions on their face indicates exactly the contrary: that they were separate and distinct provisions and could not be construed together. For example:

(1) §§26-2101 and 26-2105 do not refer to each other, were passed by different legislatures — in 1968 and 1971, respectively [54] — and have separate and different penalty provisions.[55]

(2) §26-2101(b) applies to anyone who distributes obscene material — i.e., anyone who "sells, lends,

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[53] *Touchton* v. *Echols County*, 211 Ga. 85, 84 S.E.2d 81 (1954), upon which the Supreme Court of Georgia relied in support of its holding that the two provisions should be "construed together" (JA 53), was a *civil* proceeding not involving any criminal penalties. Cf. *Wood* v. *State*, *supra* (failure of a statute defining bribery to provide for punishment could not be cured by reference to the penal provision of another bribery statute to which the deficient statute did not allude; conviction reversed).

We do not challenge the Supreme Court of Georgia's departure from the *Wood* precedent in this case as a matter of state law. Again, however, we do challenge that departure insofar as it deprived Appellant of due process of law. See footnote 53, *supra*.

[54] §26-2101 (a), however, was amended in 1971 in a manner which is not relevant here. (Georgia Laws 1971 Session, p. 344.)

[55] See footnote 45, *supra*.

rents, leases, gives, advertises, publishes, exhibits or otherwise disseminates." Georgia Code Ann. §26-2101 (a). By contrast, §26-2105 applies to persons who perform certain conduct, as well as to anyone "who procures, counsels or assists any person to engage in such conduct or who knowingly exhibits or procures, counsels or assists in the exhibition of" material embodying such conduct. Georgia Code Ann. §26-2105(a, b).

(3) §26-2105 applies to material portraying acts defined to constitute "public indecency"[56] — "An act of sexual intercourse," "A lewd exposure of the sexual organs," "A lewd appearance in a state of partial or complete nudity" and "A lewd caress or indecent fondling of the body of another person." As of 1971, by contrast, §26-2101(b) had already been applied to material portraying acts different from those encompassed by §26-2105.[57]

(4) §26-2101(b) is to be applied in accordance

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[56]See footnote 41, *supra*.

[57]See *Gornto* v. *State*, 227 Ga. 46, 178 S.E.2d 894, 896 (1970), *cert. denied*, 402 U.S. 933 (1971): "photographic depictions of nudity (including unclothed human male and female genitalia in close proximity) and acts of homosexuality, sadism and masochism, and verbal descriptions (in coarse, vulgar language) of acts of masturbation, homosexuality, sodomy, bestiality, sexual intercourse (fornication), sadism and masochism"; *Evans Theatre Corporation* v. *Slaton*, 227 Ga. 377, 180 S.E.2d 712, 714 (1971), *cert. denied*, 404 U.S. 950 (1971): "acts of sexual intercourse, natural, unnatural, bizarre, and violent," and castration; *Walter* v. *Slaton*, 227 Ga. 676, 182 S.E.2d 464, 467 (1971), *cert. denied*, 404 U.S. 1003 (1971): "actual sexual activity, both natural and unnatural, of the most salacious character"; 1024 *Peachtree Corporation* v. *Slaton*, 228 Ga. 102, 184 S.E.2d 144, 145-146 (1971):

with "community standards."[58] §26-2105, by contrast, makes no mention of community standards; indeed, as a state statute of general application, it expresses a statewide community standard.

Under these circumstances, "[n]o fair reading" of §26-2105 could have possibly informed Appellant that it would be "construed together" with §26-2101(b). *Cohen* v. *California*, *supra* at 19. Indeed, §26-2105 neither contains nor implies the concept of obscenity. In addition, "[n]o fair reading" of §26-2105 could "be said sufficiently to inform the ordinary person that distinctions between certain locations [within the State of Georgia] are thereby created." *Ibid.* It would therefore have taken "extraordinary clairvoyance" for Appellant to have guessed, let alone known, that the clear language of §26-2105 "really" meant what the Supreme Court of Georgia was destined to hold it meant more than 17 months after the commission of

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"film. . . dominated by nudity and sex," including intercourse, cunnilingus and masturbation; *Slaton* v. *Paris Adult Theatre I*, 228 Ga. 343, 185 S.E.2d 768, 770 (1971), vacated and remanded, 413 U.S. 49 (1973), affirmed on remand, — Ga. —, — S.E.2d — (October 30, 1973): "simulated sexual activity... conduct of the most salacious character."

[58]It is difficult to determine what were the applicable community standards under §26-2101(b) in January, 1972, when Billy Jenkins exhibited "Carnal Knowledge" in Albany, Georgia. In *Gornto* v. *State*, *supra*, 178 S.E.2d at 896, the Supreme Court of Georgia held that the applicable community standards were "local." However, in *Evans Theatre Corporation* v. *Slaton*, *supra*, 180 S.E.2d at 714, the Supreme Court of Georgia appeared to retreat from the *Gornto* holding by applying both "local" and "national" standards. §26-2101(b) cases are then silent on this issue until well after January, 1972, when two Court of Appeals decisions held that the

the alleged offense. *Shuttlesworth* v. *City of Birmingham, supra* at 156.[59]

It was only on July 2, 1973, when the Supreme Court of Georgia affirmed his conviction, that Appellant knew or could have know that §§26-2105 and 26-2101(b) were to be "construed together,"[60] and that it was permissible to apply §26-2105 in accordance with "local" community standards.

Accordingly, since Appellant's "conviction was thus affirmed under a statute with a meaning quite different from the one he was charged with violating," *Rabe v. Washington*, 405 U.S. 313, 315 (1972) (per curiam), he was clearly denied due process of law. See also: *Douglas v. Buder, supra* at 432; *Shuttlesworth* v. *City of Birmingham, supra* at 155; *Ashton* v. *Ken-*

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applicable community standards were "national." *Feldschneider* v. *State*, 127 Ga.App. 745, 195 S.E.2d 184 (1972); *Fishman* v. *State*, 128 Ga.App. 505, 197 S.E.2d 467 (1973).

However, none of these §26-2101(b) cases ever applied *statewide* community standards.

[59]Cf. *Miller* v. *California, supra at* 16-18 n. 1 (emphasis added), in which this Court held that *no ex post facto* issue was presented because the law applied was the state obscenity law "as construed by state decisions *prior* to the commission of the alleged offense."

[60]After holding that §§ 26-2105 and 26-2101(b) were to be "construed together," the Supreme Court of Georgia proceeded to affirm Appellant's conviction under "Georgia Statutes" (JA 55; emphasis added). It is thus apparent that Appellant's conviction was affirmed, at least in part, under a statute, §26-2101(b), he was never charged with violating. Accordingly, Appellant was denied due process of law for this reason also. *Cole* v. *Arkansas*, 333 U.S. 196, 201 (1948).

tucky, 384 U.S. 195, 198 (1966); *Bouie* v. *City of Columbia*, 378 U.S. 347, 353-355 (1964).

In short, from whatever perspective and at whatever stage the proceedings below are viewed, Appellant was clearly denied due process of law. His conviction must therefore be reversed.

CONCLUSION

For the reasons set forth above, the judgment of the Supreme Court of Georgia violates the First and Fourteenth Amendments to the United States Constitution, and therefore must be reversed.

Respectfully submitted,

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APPENDIX

[Review of "Carnal Knowledge" by Hollis Alpert, in *Saturday Review*, July 3, 1971, page 18.]

From the time of Jules Feiffer's earliest cartoons in *The Village Voice* his males and females have been engaged in eternal complaint. Strive as they may for enduring and "meaningful" relationships, they never manage to breach the barrier between the sexes. Now the loosely drawn faces of the cartoons have reached a kind of apotheosis in *Carnal Knowledge*, a film written by Feiffer and directed by Mike Nichols for Joseph E. Levine, and the collaboration has resulted in something very special.

For Feiffer, the film probably represents a summing up of his feelings, his attitudes, his knowledge, even his wisdom regarding the mating games played in our society. The view is sardonic, the cartoonist's touch is still in evidence, but there are both precision and reality in the way his people have been captured. For Nichols, his fourth film is his best: it represents direction in the truest sense, which is to say he has achieved clarity without obviousness and has guided his actors to give the performances of their lives. If you thought Jack Nicholson was good before, you will find him superb on this outing. If you thought Ann-Margret was just another glamorized Hollywood sexpot, think again. She is unforgettable.

The structure of the film is daring. The time span encompasses more than twenty years from the late 1940s to the late 1960s. We are never given precise dates, but we are oriented, easily enough, by songs on

the soundtrack, by styles of dress, by subtle changes in decor. True, Jack Nicholson seems a bit weathered as an Amherst undergraduate in a few of the early scenes, but the spirit is accurate and he displays astonishing power as he advances into a lengthly bachelorhood and a brief but disastrous marriage. Candice Bergen is introduced early as a bright girl from Smith; after forty minutes or so she disappears, physically that is, for her presence is felt thereafter. We never see her as an upper-middle-class wife, living and child-raising in the suburbs, but we know her.

However, it is not so much her story as that of two young college men, roommates and lifelong friends forever preoccupied with their sex lives. Both are first met as virgins. Nicholson is the more knowledgeable and attractive of the two; speaking colloquially, he is a burgeoning bastard. Art Garfunkel is his friend, the nice but troubled guy straight out of those early Feiffer cartoons, but *real*. He falls in love with the lovely Susan (Candice Bergen) and unknowingly shares her with his college buddy. As the "safer" one of the two, he is selected by Susan for marriage.

The time changes. Both men are in their thirties, pursuing successful careers in New York. Nicholson has been running through an average of a dozen women a year but has never managed to meet the right one, the one with the full bosom, the good legs, the properly rounded bottom. More than that, each and every one is a threat to his malehood and peace of mind, until at last, in a bar, he finds Ann-Margret, an aging bachelor girl with striking cleavage and, quite obviously, something of a past. "Why don't we shack up?" she sug-

gests. They do and a horrendous relationship ensues, complicated mainly by her paranoidal desire to marry. Meanwhile, what of Garfunkel? The sparks have gone out of his marriage, the sex has lost its savor, and Garfunkel tries once more. And later, even more foolishly, again.

Never do Nichols and Feiffer allow a whiff of sentimentality to cloy their tale. If there is sympathy, it is because the people, through all their betrayals of and double-dealings with each other, somehow manage to remain likable. They are struggling with a bewildering change in mores; they are truly the prisoners of sex. And they remain so into their fatuous middle age. A cruel film perhaps, but an essentially honest one. Not only is the film, overall, the best-acted in years; it is also the most mature of all those American films that have attempted to deal with the subject of sex in these ultra-liberated cinematic times.

CERTIFICATE OF SERVICE

I hereby certify that I have served three copies each of this Brief for Appellant, along with three copies each of the Joint Appendix, upon counsel for Appellee, Mr. Carter Goode, Fulton County Courthouse, Atlanta, Georgia 30303, and Mr. Tony H. Hight, Suite 406, 501 Pulliam Street, Atlanta, Georgia 30312, by depositing copies of said Brief for Appellant and Joint Appendix in the United States Mail, properly addressed and with sufficient postage thereon to insure delivery first class.

I hereby certify that all parties required to be served have been served.

This day of January, 1974.

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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-557

BILLY JENKINS,

Appellant,

v.

STATE OF GEORGIA,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF GEORGIA

BRIEF OF NATIONAL ASSOCIATION OF THEATRE OWNERS AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT

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IN THE

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No. 73-557

BILLY JENKINS,

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v.

STATE OF GEORGIA,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF GEORGIA

BRIEF OF NATIONAL ASSOCIATION OF THEATRE OWNERS AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT

Statement of Interest of *Amicus Curiae*

The National Association of Theatre Owners (hereinafter "NATO") is a trade association which represents the interests of motion picture theatres throughout the United States. It has a membership of over 8,000 theatres, representing a capital investment of over $5 billion, located in cities, suburbs, small towns and rural areas across the country. Its members include large "downtown" theatres, neighborhood theatres, shopping center theatres, drive-in theatres and multi-screen theatres, and the motion pictures they show represent an immensely important medium of artistic, cultural, political and social

expression, as well as entertainment, for untold millions of American movie-goers.

NATO and its members are vitally interested in this appeal, which, unfortunately, involves a not atypical example of how this Court's rulings in *Miller* v. *California*, 413 U.S. 15 (1973) and *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49 (1973), are being misapplied to strike at the very heart of the First Amendment rights of theatre owners to show films of literary, artistic, political or scientific value, regardless of how controversial they may be.

The Appellant-theatre owner in this case was convicted under a state criminal statute, not for displaying hard core pornography, but for showing in Albany, Georgia one of the most critically acclaimed motion pictures of recent years, which had previously played "in the major cities of the nation, the major cities in Georgia, and in many of the cities and towns in Georgia without any contention being publicly made that it was obscene-pornographic".[1] Clearly, if a motion picture such as Carnal Knowledge is deemed obscene and therefore beyond the pale of constitutional protection, then all of NATO's members face a real threat of criminal prosecution whenever they show any film that could conceivably be found objectionable by some local prosecutor and jury. Indeed, the gravity of this danger grows each day as the pattern of local prosecution and harassment that has followed *Miller* becomes increasingly pronounced. Thus, the decision of the Georgia Supreme Court in this case serves to chill—if not freeze—the exercise of First Amendment rights of expression so far as this nation's theatre owners are concerned. The result, in our submission, can only be to lower the quality and diversity of the motion pictures shown across the country and seriously impair one of our most popular and available forums for the free interchange of ideas.

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[1] *Jenkins* v. *Georgia*, 230 Ga. 726, —, 199 S.E.2d 183, 186 (1973) (Gunter, J., dissenting).

All of the parties to this appeal have consented to the filing of this brief pursuant to Rule 42 of the Supreme Court of the United States.

Preliminary Statement

Appellant's Jurisdictional Statement and Brief on this appeal raise a number of issues concerning the interpretation and application of the relevant Georgia statutes and the particular procedures followed in the trial court below. We reiterate NATO's position, stated in its brief *amicus curiae* in support of the Jurisdictional Statement, that it would be most unfortunate if this appeal were adjudicated on these issues which can have little significance outside the State of Georgia or the particular facts of this case. Rather, we urge the Court to resolve the following issues which are squarely presented by the record below, are of vital constitutional significance, and will have an important impact on future obscenity prosecutions throughout the country.[2] Furthermore, unless they are promptly resolved, and the Court's decision in *Miller* clarified, there will be a severe chilling effect on First Amendment rights in the creation and distribution of motion pictures and literature.

1. Whether the film Carnal Knowledge is obscene and hence devoid of constitutional protection (Point I).

2. Whether, even in the short time since they were promulgated, the standards enunciated in *Miller* to separate obscenity from constitutionally protected material have been so demonstrably misinterpreted by lower courts and so ineffective in providing clear and consistent guidelines, that they should be clarified to express the Court's views in a more meaningful way (Point II).

[2] All of the issues raised on this appeal from a state court are constitutional. In these circumstances, it is appropriate for the Court to adjudicate those of particular significance. *See Street* v. *New York*, 394 U.S. 576 (1969).

3. Whether the *Miller* standards should be clarified by adding a fourth criterion that material is not obscene unless, taken as a whole, it is patent and obvious hard core pornography (Point III).

4. Whether the *Miller* standards should be clarified by eliminating "serious" from the third criterion and providing that a work is obscene only if, taken as a whole, it lacks any literary, artistic, political or scientific value (Point IV).

5. Whether *Miller* authorizes the more than 78,000 local political and judicial subdivisions throughout this country each to apply its individual community standards in determining whether a work appeals to the prurient interest or is patently offensive, or whether state-wide standards are constitutionally required (Point V).

6. Whether *Miller* requires a single, national standard to determine whether a work has literary, artistic, political or scientific value (Point V).

The decision of the Georgia Supreme Court below is so at war with the principles of *Miller* as to require not only reversal, but a clarification of the *Miller* standards themselves. Such a gross misapplication by the highest court of a state must raise serious questions about the clarity and effectiveness as guidelines of the standards themselves. Moreover, as construed by the Georgia Court to strike down a picture so obviously not obscene as Carnal Knowledge, *Miller* provides local prosecutors with a roving commission to stamp out almost any work that offends their particular sensibilities.

Unless the Court takes this opportunity to elaborate and refine the *Miller* standards, prosecutors, juries, lower courts and those conscientiously trying to follow the law will have no reasonable understanding of the difference between protected First Amendment expression and criminal acts, and the right to free speech in this area will become hostage to unbridled prosecutorial discretion and uncertain judicial result.

Facts

Avco Embassy Pictures Corporation, the distributor, pursuant to a contract with Mike Nichols,[3] the producer-director, purchased the rights to an original screenplay of Carnal Knowledge in November, 1969. The author of the screenplay was Jules Feiffer, a well-known satirist and playright. Mr. Nichols cast Jack Nicholson, Art Garfunkle, Ann-Margret and Candice Bergen, all nationally-renowned, highly successful actors and actresses, in the leading roles. Ann-Margret received an Academy Award nomination for her performance in the movie.

The picture opened in June, 1971, 20 months after purchase of the screenplay. Production costs ran to approximately $5,400,000. In addition, marketing and distribution costs were approximately $3,400,000, as of December 31, 1973.

Carnal Knowledge played in 4,995 theatres, in every state of the Union, including large cities, suburbs, towns and rural areas. It played in other small Georgia communities in addition to Albany such as Camilla, Cordale, Valdosta, Douglas, Fitzgerald, Milledgeville, Dalton, Rome and Carlton. Approximately 17,500,000 persons saw the movie in the United States.[4]

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[3] Mr. Nichols has directed other major films, such as Who's Afraid of Virginia Wolff, The Graduate, Catch 22, and The Day of the Dolphin. While the factual material contained in this section of the brief is not in the record, it comes mostly from public sources such as trade journals and financial reports, and is not controverted. Therefore, the Court may take judicial notice of it. *See Granville-Smith* v. *Granville-Smith*, 349 U.S. 1, 14 (1955); *W. A. Mack, Inc.* v. *General Motors Corp.*, 260 F.2d 886, 889-90 (7th Cir. 1958); *United States* v. *An Easement and Right of Way Over Two Tracts of Land*, 246 F. Supp. 263 (W.D. Ky. 1965), *aff'd.*, 375 F.2d 120 (6th Cir. 1967).

[4] Avco Embassy reported total license fees from United States distribution at $12,373,000. We estimate, based on average industry figures, that the distributor's license fees constituted 35 percent of box office admissions and that each viewer paid, on the average, $2 for admission. Thus, approximately 17,500,000 people paid approximately $35,000,000 in box office fees to see Carnal Knowledge.

Carnal Knowledge was one of the most widely acclaimed films of recent years, appearing on many "ten best" lists for 1971, and was the subject of scores of highly complimentary reviews.[5]

Up to the time Appellant showed the movie in Albany it had not been held obscene any place. So far as we are aware, the present case is the only instance in which the film has been held obscene.[6]

Despite these impressive credentials, which would have given any theatre owner strong assurance that he was engaging in constitutionally protected activity when he showed the movie, Appellant was arrested and convicted of violating Georgia statutes which provide for a maximum sentence of one year imprisonment or fine of $1000 or both. Ga. Code Ann., § 27-2506 (1972). Appellant was in fact sentenced to 12 months probation and fined $750.

The only evidence introduced at trial by the prosecution was the film itself. There was no expert testimony, or indeed testimony of any kind, as to whether the film, taken as a whole, had serious literary, artistic or political value.

On appeal, the Georgia Supreme Court affirmed Appellant's conviction by a four to three vote, holding, *inter alia*, that Carnal Knowledge was obscene within the meaning of the standards enunciated by this Court in *Miller*, and that the trial judge correctly charged the jury to apply a "community standard," by which he meant the local standard of Dougherty County, Georgia, in determining

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[5] Some of these reviews are referred to in the dissenting opinion of Justice Gunter below, 230 Ga. at —, 199 S.E.2d at 186 and in Appellant's brief on this appeal.

[6] Indeed, as Appellant's brief points out, it appears to have been challenged in only a handful of instances, all unsuccessfully.

whether this Court's obscenity standards were met by this picture.[1] *Jenkins* v. *Georgia*, 230 Ga. 726, 199 S.E.2d 183 (1973).

This Appeal followed, and the Court noted probable jurisdiction. 42 U.S.L. Week 3351 (U.S. Dec. 11, 1973).

POINT I

Carnal Knowledge is not obscene under *Miller*.

This Court in *Miller* established the following standard to determine whether material is obscene and hence not protected by the First Amendment:

> "The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." 413 U.S. at 24 (citations omitted).

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[1] The trial judge instructed the jury to apply a "community standard" and the Georgia Supreme Court clearly understood this to refer to the local community in Dougherty County, Georgia, rather than the state as a whole. Thus Justice Jordan's majority opinion interpreted *Miller* as authorizing "state or local community standards in lieu of 'national standards'." 230 Ga. at — , 199 S.E.2d at 184. This shows that the Georgia Court considered a "local" standard to encompass a smaller area than a "state" standard. Furthermore, Justice Gunter's dissent states that the majority was referring to "this 'local community'" as meaning Dougherty County, 230 Ga. at —, 199 S.E.2d at 185, and Justice Hawes' dissent specifically points out that the majority approved "small towns and hamlets as being the 'community' from which the standard for obscenity is drawn . . ." 230 Ga. at — , 199 S.E. 2d at 189.

As a matter of constitutional fact, a simple viewing of Carnal Knowledge makes it abundantly clear that it does not meet any of the three criteria of the *Miller* test.[8]

(a) Carnal Knowledge, taken as a whole, does not appeal to the prurient interest.

An appeal to the prurient interest means "a shameful or morbid interest in nudity, sex, or excretion," and "lewd" and "lascivious." *Roth* v. *United States*, 354 U.S. 476, 487 n. 20 (1957).

This film simply does not meet such a test. It does not contain even a single explicit portrayal of an ultimate sexual act or of genitals. It is an artistic work of distinction and sensitivity. The direction, acting and photography are of the highest quality that the American motion picture industry can produce. The story is about the pressures and problems faced by two upper-middle class Amherst College graduates as they grow up, attaining success in their professional careers, but failure in their personal lives. In illuminating their inability to develop stable and satisfying relationships, and ultimately their boredom and loneliness, the film deals with the human predicament. While part of this predicament is that sex by itself is not a

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[8] It is, of course, squarely within this Court's province to determine whether Carnal Knowledge is in fact obscene under the relevant constitutional standards since "the duty rests on this Court to decide for itself facts or constructions upon which federal constitutional issues rest." *Kern-Limerick, Inc.* v. *Scurlock*, 347 U.S. 110, 121 (1954). Chief Justice Burger, writing for the Court in *Miller*, made it clear that this Court would continue to exercise its "ultimate power" "to conduct an independent review of constitutional claims when necessary", 413 U.S. at 25, and approvingly quoted from Mr. Justice Harlan's dissent in *Roth* v. *United States*, 354 U.S. 476, 498 (1957): "Our duty admits of no 'substitute for facing up to the tough individual problems of constitutional judgment involved in every obscenity case.'" 413 U.S. at 29-30. *See also Jacobellis* v. *Ohio*, 378 U.S. 184 (1964); *Napue* v. *Illinois*, 360 U.S. 264 (1959); *Niemotko* v. *Maryland*, 340 U.S. 268 (1951).

substitute for meaningful relationships and hence does not provide fulfillment, no finder of fact could reasonably conclude that the film, taken as a whole, appeals to the prurient interest.

First of all, as this Court made clear in *Roth*, sex and prurience are not synonymous:

> "The portrayal of sex, *e.g.*, in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press. Sex, a great and mysterious motive force in human life, has indisputably been a subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern." *Roth* v. *United States, supra,* 354 U.S. at 487. [footnotes omitted]

Sex is treated in this film as a vital but sometimes baffling and exasperating part of life, but without lewdness or lascivity. While the leading male characters are preoccupied with sex, the picture is not; it deals with them as immature and troubled personalities unable to cope with the world around them.

Second, the great bulk of the picture does not depict sexual acts in any way, and where they are portrayed, it is done discreetly, obliquely, only suggestively, and as a natural, illustrative aspect of the theme. Thus "the dominant theme of the material taken as a whole," *Memoirs* v. *Massachusetts,* 383 U.S. 413, 418 (1966), does not appeal to the prurient interest.

(b) Carnal Knowledge does not depict sexual conduct in a patently offensive way.

Even those brief parts of the film which are concerned with sexual acts cannot be held patently offensive within the meaning of the second criterion of the *Miller* standards. For they plainly do not go "substantially beyond customary limits of candor in description or representation of

such matters," *Jacobellis* v. *Ohio*, 378 U.S. 184, 191 (1964); nor are they "portrayed in a manner so offensive as to make it unacceptable under current community mores," *Manual Enterprises, Inc.* v. *Day*, 370 U.S. 478, 482 (1962).

Carnal Knowledge cannot, by any standard, be put in the same category as the kind of material considered by this Court to be patently offensive.[9] It is tame stuff indeed compared to the material at issue in the cases decided by this Court in the recent past.[10] The sexual acts are only suggested, never explicitly depicted, and there is no showing of the genitals in those scenes suggesting sexual activity.

Surely Carnal Knowledge, which has played to an estimated 17,500,000 people, in every state, indeed in practically every village and hamlet in America, almost without

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[9] As Justice Hawes pointed out dissenting below: "Certainly, the film under consideration here is not the kind of hard-core pornography we removed from public consumption in [*Slaton*]." *Jenkins* v. *Georgia*, 230 Ga. 726, —, 199 S.E. 2d 183, 190 (1973) (Hawes, J., dissenting.)

[10] For example, *Miller* dealt with brochures advertising four books —Intercourse, Man-Woman, Sex Orgies Illustrated, An Illustrated History of Pornography—and a film entitled Marital Intercourse. The Court found, "[P]rimarily they consist of pictures and drawings very explicitly depicting men and women in groups of two or more engaging in a variety of sexual activities, with genitals often prominently displayed." 413 U.S. at 18. *Slaton* dealt with two pictures depicting "scenes of simulated fellatio, cunnilingus, and group sex intercourse." 413 U.S. at 52. The book in question in *Kaplan* v. *California*, 413 U.S. 115 (1973), "Suite 69" is, according to the Court's characterization, "made up entirely of repetitive descriptions of physical, sexual conduct, 'clinically' explicit and offensive to the point of being nauseous; there is only the most tenuous 'plot.' Almost every conceivable variety of sexual contact, homosexual and heterosexual, is described. Whether one samples every fifth, 10th or 20th page, beginning at any point or page at random, the content is unvarying." *Id.* at 117.

incident, cannot be found to go substantially beyond customary limits of candor. To affirm a fact-finder's holding otherwise would mean that juries and judges could completely exclude any and all photographic suggestions—not merely specific close-ups—of sexual activities from films. In light of *Roth's* pointed comments that "sex and obscenity are not synonymous" and that "[t]he portrayal of sex . . . is not itself sufficient reason to deny . . . constitutional protection." 354 U.S. at 487, upholding the Georgia courts on this issue would mark a sharp, unwarranted break with precedent. *See also Jacobellis* v. *Ohio*, 378 U.S. 184, 196 (1964) (holding the movie, The Lovers, not obscene notwithstanding "an explicit love scene in the last reel of the film").

(c) Carnal Knowledge, taken as a whole, does not lack serious literary, artistic, political or scientific value.

It is inconceivable that a movie such as this—which many critics found to be one of the ten best of the year; which had a star nominated for an Academy Award; and which scores of reviewers[11] analyzed on a sophisticated level, debating the ideas and values which it contained—could be found to be without serious literary, artistic or political value. An independent viewing of the picture must certainly convince the Court that all these critics are not fantasizing; on the contrary, such a viewing will persuade the Court that the picture does indeed present ideas and provocative comments about the nature of life. This is simply not the kind of picture where the viewer's thought processes are monopolized by constant and repetitive bombardment of explicit or simulated sex so that the communication of ideas and values is nonexistent. Instead,

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[11] A sampling of the reviews and critiques are cited in Appellant's brief.

this is a major artistic work in which the very limited amount of sex portrayed is an integral part of the overall theme. Where, as here, the sex portrayed is incidental to the story, and not vice versa, the work should be protected under the First Amendment.

POINT II

This case demonstrates that the *Miller* standards need to be clarified.

This Court has consistently recognized the necessity of establishing standards for determining obscenity which will provide clear and predictable guidelines that do not chill or impinge upon First Amendment rights. There are obviously "inherent dangers of undertaking to regulate any form of expression," *Miller* v. *California, supra,* 413 U.S. at 23, because "freedoms of expression . . . are vulnerable to gravely damaging yet barely visible encroachments," *Bantam Books, Inc.* v. *Sullivan,* 372 U.S. 58, 66 (1963).

Most state criminal obscenity statutes, as a practical matter, have this Court's changing definitions of obscenity incorporated into their definitions of prohibited activity. Thus in most states, and under many federal criminal statutes outlawing obscenity,[12] the dissemination of material which is obscene under the Court's standards is ipso *facto* a crime. When the Court promulgates obscenity standards, while it formally purports only to draw the outside line to which state regulation can reach, in practical effect it draws a vitally important line separating the

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[12] *See, e.g.,* 18 U.S.C. § 1461 (1970) (use of mails); 18 U.S.C. § 1462 (1970) (importation); 18 U.S.C. § 1463 (1970) (use of obscene mailing wrappers); 18 U.S.C. § 1465 (1970) (transportation in interstate commerce for sale and distribution).

exercise of First Amendment rights from criminal activity, one which the Court has acknowledged can all too easily become "a dim and uncertain line," *Bantam Books, Inc.* v. *Sullivan, supra,* 372 U.S. at 66.

It is imperative that this line be as clear and precise as possible for the reasons articulated in Mr. Justice Brennan's dissenting opinion in *Paris Adult Theatre I* v. *Slaton, supra,* 413 U.S. at 83-93.

First, a vague standard does not warn those conscientiously trying to obey the law what is prohibited activity. It has long been recognized as unconscionable for government to force its citizens to guess at what may or may not be a crime. *Lanzetta* v. *New Jersey,* 306 U.S. 451 (1939); *Connally* v. *General Construction Co.,* 269 U.S. 385 (1926). The predicament of Appellant in the instant case demonstrates the danger. He has been convicted of a crime, fined and given a year's suspended sentence, for showing a movie which had previously played all over the United States and the State of Georgia, and he will not finally know whether his actions in February, 1972 were criminal or an exercise of free speech until this Court finally renders its decision. It is essential, we suggest, that the Court in this case articulate a rule which will prevent others from being put in the same position in the future.

Second, imprecise language in a criminal standard provides an unacceptable leeway for prosecutors and police officials to engage in arbitrary, even discriminatory, enforcement of the law based on unrevealed personal interests and biases. Particularly when this threatens First Amendment rights, the Court has been vigilant in preventing even the potential for such abuse by demanding precision. As the Court said in *Grayned* v. *City of Rockford,* 408 U.S. 104, 108-09 (1972), "A vague law impermissibly delegates basic policy matters to policemen, judges and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory applica-

tion." See also *Gregory* v. *City of Chicago*, 394 U.S. 111, 120 (Black, J., concurring). It is tempting to speculate why this film was prosecuted in Albany and not Camilla, Valdosta or Fitzgerald, Georgia or the hundreds of other towns it played in that are similar to Albany.

Third, lack of clarity will inescapably have a "chilling" or deterrent effect on the lawful exercise of free speech. Many authors, directors, producers, distributors, exhibitors and booksellers, understandably concerned for their own personal or economic welfare, will simply not approach the zone of uncertainty if the penalty for guessing wrong is a criminal sentence. "Uncertain meanings inevitably lead citizens to 'steer far wider of the unlawful zone' ... than if the boundaries of the forbidden areas were clearly marked." *Grayned* v. *City of Rockford, supra,* 408 U.S. at 109 (footnote and citations omitted). And this Court, mindful of the constitutional imperative of open and robust debate on all issues of the day, has rightfully stressed the importance of preventing such a chilling effect by requiring clarity and precision in regulating speech. "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity. *Cantwell* v. *Connecticut,* 310 U.S. 296, 311." *NAACP* v. *Button,* 371 U.S. 415, 433 (1963). Where such specificity is lacking, "free expression—of transcendent value to all society, and not merely to those exercising their rights—might be the loser." *Dombrowski* v. *Pfister,* 380 U.S. 479, 486 (1965).

Carnal Knowledge took 20 months to produce and cost the distributor for production and marketing approximately $8,800,000. No company, in making artistic decisions during the production of such a film, could afford to approach an imprecise line demarking criminality because a wrong prediction would result in tremendous financial losses. Of course, exhibitors threatened with fines

and imprisonment would be even more unwilling to show a picture with uncertain constitutional protection.

For all these reasons the Court has invariably demanded that "sensitive tools" be used to carry out the "separation of legitimate from illegitimate use of speech." *Speiser* v. *Randall*, 357 U.S. 513, 525 (1958), *quoted in Paris Adult Theatre I* v. *Slaton, supra*, 413 U.S. at 79 (Brennan, J., dissenting.)

There was a basic disagreement within the Court in *Miller* and *Slaton* as to whether the Court's obscenity standards were clear enough to avoid these dangers. The dissenting Justices in *Slaton* concluded that "we have been unable to provide 'sensitive tools' to separate obscenity from other sexually oriented but constitutionally protected speech, so that efforts to suppress the former do not spill over into suppression of the latter," 413 U.S. at 79, (Brennan, J. dissenting). But the majority in *Miller* concluded that the fact that "for the first time since *Roth* was decided in 1957, a majority of this Court has agreed on concrete guidelines . . . [means that the Court can] provide positive guidance to the federal and state courts alike", 413 U.S. at 29.

Decisions, even in the short time since *Miller*, have demonstrated that the majority was unduly optimistic in thinking they were providing clear guidance just because they agreed on the same standard. In the event, that standard has proved too vague and imprecise to communicate the Court's intentions or provide reasonable predictability of meaning. The incredible decision by the Supreme Court of Georgia purporting to apply the *Miller* standards in this case makes clear that the existing three prong test is insufficient. Unfortunately, this case is not an isolated aberration. Last Tango in Paris, a motion pic-

ture of comparable taste and distinction,[13] has been held obscene under *Miller*[14] and harassed by local prosecutors relying on the *Miller* standards in many parts of the country.[15]

It is apparent even from this short experience that the *Miller* standards do not provide consistent or meaningful

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[13] Reviewer Judith Crist noted on the "Today Show," February 2, 1973, that Last Tango in Paris while it did include scenes depicting sex and while it involved a primarily sexual relationship between the two principal characters "is not about sex, and it is not about inhumanity. And thanks to Marlon Brando's simply stunning performance, which gives the whole film an aura of greatness . . . it is about the things that a man lives by; and, essentially, its theme is that you cannot live in isolation by sex alone." The *New York Daily News* reviewer, Wanda Hale, said: "It took guts to play the libertine in 'The Last Tango in Paris' and Marlon Brandon gives a shattering portrayal of a sick man more to be pitied than condemned." (February 28, 1973, p. 68). Alan M. Kriegsman of *The Washington Post* commented: "The characters' drives may be expressed biologically, but that is by no means their entire essence. In fact, on the evidence of the film, the characters' motivation, as distinct from their appetites, is basically psychological and romantic, "Tango," in other words, is not about sex. It is about the possibility of communication, in particular, of emotional communion between people in a contemporary milieu. If Bertolucci was trying to "say" anything at all, it was about love, not eroticism. This means, for one thing, that there is no disparity between the romantic style of the film, with its Rembrandtian light and color, ornate decor, and gliding, spiralling camera movement on the one hand, and its affective content on the other." (June 3, 1970, § M, at 10).

[14] *Gulf States Theatres of Louisiana, Inc.* v. *Richardson*, unreported (1st Jud. Dist. Ct., Parish of Caddo) (Oct. 12, 1973), *rev'd on other grounds*, — La. —, 42 U.S.L. Week 2362, — So. 2nd — (Sup. Ct. Dec. 3, 1973).

[15] *See, e.g., United Artists Corporation* v. *Harris*, 363 F.Supp. 857 (W.D. Okla., 1973) and *United Artists Corporation* v. *Proskin*, 363 F.Supp. 406 (N.D.N.Y., 1973), (both involving threats of prosecution deferring exhibition of Last Tango in Paris). *See also Incorporated Village of Lynbrook* v. *United Artists Corp.*, 75 Misc. 2d 124, — N.Y.S. 2d — (Sup. Ct. 1973). Unfortunately, no citations record the countless threats and harassment of theatre owners which have sharply accelerated since *Miller*. In any instances, theatre owners, rather than incurring the risk and expense of resistance, simply bow to the pressure, and there is no record of these impingements on First Amendment rights.

guidelines to lower courts and will not be given a uniform or predictable application. Thus the dangers from a vague standard referred to above will not be avoided. Furthermore, the fact that state courts are holding Carnal Knowledge and Last Tango in Paris obscene establishes that the *Miller* guidelines are subject to grievous misinterpretation.

However, a solution to this dilemma may not necessarily require adoption of the dissenting position in *Slaton*.[18] Indeed, experience since Miller may show how the standards can be modified to give clearer guidance and certainty while preserving the substance of the *Miller* and *Slaton* holdings. Therefore, we urge this Court to clarify and elaborate the *Miller* standards, and we suggest appropriate ways to accomplish this in Points III and IV, *infra*.

POINT III

The *Miller* standards should be clarified to provide that only patent and obvious hard core pornography is unprotected by the First Amendment.

Although there is no specific reference to hard core pornography in the *Miller* standards themselves, the Court specifically stated that its purpose in establishing them was "to isolate 'hard core' pornography from expression protected by the First Amendment." 413 U.S. at 29. The Court further made clear that:

> "Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive *'hard core' sexual conduct* specifically defined by the regulating state law as written or construed." 403 U.S. at 27. (Emphasis added.)

[18] NATO believes that as matters of wise policy and constitutional imperative, consenting adults should be free to view or to read whatever material they wish. Thus, we fully agree with Mr. Justice Brennan's dissenting opinion in *Slaton*. However, we do not pause to reargue the issue since the Court has considered it so recently.

There are five separate references to hard core pornography or sexual conduct in the Chief Justice's majority opinion in *Miller*,[17] and another in his opinion in *Slaton*.[18] It seems clear from this that the Court conceived the *Miller* standards to encompass what is commonly known as hard core pornography.

However, the Georgia Supreme Court did not perceive this from its reading of *Miller*. Although that Court specifically held in *Slaton* that the films at issue were "hard core pornography", *Paris Adult Theatre I* v. *Slaton* 228 Ga. 343, 347; 185 S.E. 2d 768, 770 (1971), it made no such finding as to Carnal Knowledge in this case. Of course, Carnal Knowledge is obviously not hard core pornography, as pointed out by Justice Hawes in his dissent below. 230 Ga. at —, 199 S.E. 2d at 190.

We believe the explicit incorporation of the test of hard core pornography into the Court's obscenity standards would not only prevent future decisions such as the one below, but would also faithfully reflect the development of the law culminating in *Miller* and add substantial clarity, meaning and predictability to the standards. As various Justices of this Court have recognized, the term "hard core pornography" has meaningful and consistent content to laymen and judges alike. To paraphrase Mr. Justice Stewart, "people know it when they see it." *See Jacobellis* v. *Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). Put another way, beyond its denotative definition, the phrase has clear connotative meaning which the three criteria of the *Miller* standard simply do not possess.

Mr. Justice Stewart has elsewhere pointed out that the phrase hard core pornography encompasses a "distinct and easily definable class of material." *Ginzburg* v. *U.S.* 383

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[17] 413 U.S. at 27; 413 U.S. at 29; 413 U.S. at 35; 413 U.S. at 36; *ibid.*

[18] 413 U.S. at 52.

U.S. 463, 499 (1966). *See also Mishkin* v. *New York*, 383 U.S. 502, 518 (1966) (Stewart, *J.*, dissenting).

Similarly, Mr. Justice Harlan recognized that hard core pornography isolates a "narrow class" of material which is capable of reasonably precise definition, *Ginzburg* v. *United States, supra*, 383 U.S. at 493 (Harlan, J., dissenting), and that "it does describe something that most judges and others will 'know . . . when [they] see it' . . . [citation omitted] and that leaves the smallest room for disagreement between those of varying tastes." *Memoirs* v. *Massachusetts, supra*, 383 U.S. at 457 (1966) (Harlan, J., dissenting). Thus he concluded that federal obscenity legislation should be restricted to "hard core pornography". *Ibid.* See also *Roth* v. *United States, supra*, 354 U.S. at 507 (Harlan, J., dissenting).

This concept was put succinctly by the Court in *Slaton*, 413 U.S. at 56, n.6, *quoting United States* v. *Wild*, 422 F.2d 34, 36 (2nd Cir. 1969), *cert. denied* 402 U.S. 986 (1971): "Simply stated, hard core pornography . . . can and does speak for itself." The examples of what a state statute could define as patently offensive sexual conduct given by the Court in *Miller*, 413 U.S. at 25, are the same kind of material which, if pervading and dominating a work, would constitute hard core pornography. *See United States* v. *12 200-Ft. Reels of Film*, 413 U.S. 123, 130, n.7 (1973).

Furthermore, the Court has demonstrated that it can communicate on paper the essence of what is hard core pornography. Readers of the Court's opinions, we believe, understand hard core pornography to be mind-numbing repetitive filth of the kind at issue in *Miller, Slaton* and *Kaplan* v. *California*. It is material so dominated by explicit, lewd portrayals of sex and sex-related acts that it is substantially incapable of inducing rational thought or constituting the communication of ideas.

The description of this class of material, contained in Mr. Justice Stewart's dissenting opinion in *Ginzburg*, quoting from a description in the Solicitor General's brief of the kind of material which constitutes the great bulk of matter proceeded against under the federal obscenity laws, gives an easily understandable picture of the kind of material which constitutes hard core pornography:

> ". . . Such materials include photographs, both still and motion picture, with no pretense of artistic value, graphically depicting acts of sexual intercourse, including various acts of sodomy and sadism, and sometimes involving several participants in scenes of orgy-like character. They also include strips of drawings in comic-book format grossly depicting similar activities in an exaggerated fashion. There are, in addition, pamphlets and booklets, sometimes with photographic illustrations, verbally describing such activities in a bizarre manner with no attempt whatsoever to afford portrayals of character or situation and with no pretense to literary value. All of this material . . . cannot conceivably be characterized as embodying communication of ideas or artistic values inviolate under the First Amendment . . ." 383 U.S. at 499, n.3.

This seems to be what the Court had in mind when it said that the goal of the *Miller* standards was to "isolate 'hard core' pornography from expression protected by the First Amendment". 413 U.S. at 29. However, as shown in Point II, *supra*, lower courts and prosecutors are not getting the message. Thus, we suggest that the Court, without changing the substance of *Miller* or *Slaton*,[19] make explicit

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[19] In *Mishkin* v. *New York*, *supra*, 383 U.S. at 508, Mr. Justice Brennan suggested in dicta that hard core pornography was a different standard than the standard set out in *Roth*. Since that time, however, the Court has recognized that the *Roth* standard as elaborated in *Memoirs* v. *Massachusetts*, *supra*, 383 U.S. at 418 is "not dissimilar" from the "distinct and clearly identifiable class of material" connoted by the term had core pornography. *Redrup* v. *New York*, 386 U.S. 767, 770 (1967) (per curiam). And as explained above, *Miller* does not appear to depart from *Redrup* to the extent that *Redrup* suggests that hard core pornography is a distinct, well-understood way of describing the kind of material unprotected by the First Amendment.

what is implicit in these opinions by adding a fourth criterion to the current standards: material is protected unless, taken as a whole, it is patent and obvious hard core pornography. This would greatly clarify *Miller* and prevent other courts from going astray as did the Supreme Court of Georgia in this case.

Adding this fourth hard core pornography criterion to the Court's obscenity standard would be fully consistent with the basic thrust of the Court's obscenity holdings. The essense of *Roth* is that "ideas having even the slightest redeeming social importance" have the full protection of the First Amendment, and obscenity is not protected for the very reason that it is "no essential part of any exposition of ideas." 354 U.S. at 484-485, *quoted in Miller,* 413 U.S. at 20. *Roth,* of course, relied heavily on *Chaplinsky* v. *New Hampshire,* 315 U.S. 568 (1942), which held that "fighting words" are not protected by the First Amendment because they "are no essential part of any exposition of ideas and are of such slight social value as a step to truth that any benefit derived from them is clearly outweighed by the social interest in order and morality. . . ." *Id.* at 572, *quoted in Roth,* 354 U.S. at 484-85.

Obscenity should be defined consistent with this constitutional genesis to include only material which, like fighting words, generates immediate emotional reaction or stupefaction and is not capable of stimulating reason, thought or debate. Hard core pornography, consisting of repetitive and continuous bombardment of the senses with explicit, lewd sexual acts, unrelated to ideas, fits within this class of worthless material. Expression that does not so bombard the senses, and is capable of inducing reflection and debate, should be given First Amendment protection consistent with *Chaplinsky* and *Roth.* Furthermore, all of the materials held obscene and hence constitutionally

unprotected by this Court since *Roth* were patent and obvious hard core pornography.[20]

Thus, defining obscenity as hard core pornography would weave a standard from the consistent thread running through the Court's opinions from *Roth* to *Miller* and, by providing a reasonably meaningful and predictable guideline, would minimize the difficulties with the present *Miller* standards discussed in Point II, *supra*, and articulated in Mr. Justice Brennan's dissenting opinion in *Slaton*.

A number of state courts have already made clear that the phrase hard core pornography is meaningful to them and to the prosecutors and jurors whom they supervise. These courts have interpreted their state statutes and this Court's obscenity standards as equivalent to hard core pornography for the very reason that they know what that phrase means. For example, in *People* v. *Heller*, 33 N.Y. 2d—, — N.E. 2d—(Case No. 71-184, 1973), the New York Court of Appeals recently upheld one of that State's obscenity statutes as not void for vagueness and as meeting the *Miller* requirement that sexual conduct in material challenged as obscene be specifically defined. The New York courts had interpreted the statute as applying only to hard core pornography and, the Court reasoned, that was a well-understood concept. Thus the Court inter-

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[20] See n. 10, *supra*; *Huffman* v. *United States*, 470 F.2d 386, 396-402 (D.C. Cir. 1971) (an elaborate case by case discussion of the materials involved in the Court's obscenity decisions); *People* v. *Mature Enterprises, Inc.*,—N.Y.S. 2d—, — & n. —, 343 N.Y.S. 2d 911, 922 & n. 11 (N.Y. City Crim. Ct., 1973) (review of recent, pre-*Miller per curiam* decisions of this Court.) See also *People* v. *Noroff*, 67 Cal. 2nd 791, 433 P. 2nd 479 (1967). The only possible exception is *Ginzburg* v. *United States*, *supra*, where the Court recognized that the material in question might not be obscene if distributed in a different manner.

preted the typically worded obscenity statute:[21] "as pertaining to hard core pornography and the average man, whether he be the smut peddler or the policeman, knows it when he sees it." Slip op., at 13; *see also id.*, at 16. It pointed out that it had "applied the hard core pornography test with consistency, *id.*, at 12, and that this gave the generally worded statute a "narrow application." *Id.*, at 13. The Court also clearly equated hard core pornography with "exactly that sort of thing described in the *Miller* opinion." *Id.*, at 13.

The experience of the New York Court of Appeals in applying a hard core pornography standard shows that the phrase has consistent and well-understood meaning. Thus, Judge Fuld, writing for the Court in *People* v. *Richmond County News, Inc.*, 9 N.Y. 2d 578, 587, 175 N.E. 2d 681, 686 (1961), described hard core pornography in terms strikingly consistent with Mr. Justice Stewart's quotation from the Solicitor General's Brief in *Ginzburg*:[22]

> "It focuses predominantly upon what is sexually morbid, grossly perverse and bizarre, without any artistic or scientific purpose or justification. Recognizable 'by the insult it offers, invariably, to sex, and to the human spirit' (D. H. Lawrence, Pornography and Obscenity [1930], p. 12), it is to be differentiated from the bawdy and the ribald. Depicting dirt for dirt's sake, the obscene is the vile, rather than the coarse, the blow to sense, not merely to sensibility. It smacks, at times, of fantasy and unreality, of sexual perversion and sickness and represents, according to one thoughtful scholar, 'a debauchery of the sexual faculty.' "

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[21] The New York statute defined "obscene" as follows: "Any material or performance is 'obscene' if (a) considered as a whole, its predominant appeal is to prurient, shameful or morbid interest in nudity, sex, excretion, sadism or masochism, and (b) it goes substantially beyond customary limits of candor in describing or representing such matters, and (c) it is utterly without redeeming social value." N.Y. Penal Law, § 235.00(1) (McKinney 1967).

[22] See p. 20, *supra*.

People v. *Mature Enterprises, Inc.*, — Misc.2d —, 343 N.Y.S. 2d 911 (N.Y. City Crim. Ct. 1973), is a recent example of how the hard core pornography test has proved an effective and easily applicable guideline for New York courts to judge obscenity cases. The Court had no trouble holding the motion picture Deep Throat obscene because "it is readily recognized throughout the nation by all those not beyond the pale . . . as unmistakable hard core pornography." *Id.*, at 920. The Court concluded, after a careful review of recent obscenity cases, that the phrase hard core pornography is "readily definable and certainly more readily identifiable as a reasonable precise concept" than any other standard. *Id.*, at 919. Finally, the court concluded that the United States Supreme Court "has equated obscenity with hard core pornography without expressly saying so . . ." *Id.*, at 918.

Other state courts have frequently equated obscenity with hard core pornography, recognizing that the phrase has a connotative meaning that the Court's shifting definitions simply do not have. Indeed, many courts viewed the meaning of hard core pornography as so clear that it was not necessary to define it. The California Supreme Court in 1967, for example, carefully compared the material before it with the kind of material that the Supreme Court had found obscene. In concluding that a nudist magazine which did not depict sexual activity was not obscene, the Court noted that "the graphic depiction of such sexual activity seems to be the distinguishing feature of the only materials which the United States Supreme Court has ever ruled obscene . . . Such materials, and no others, have been thought to constitute 'hard-core pornography'." *People* v. *Noroff*, 67 Cal. 2d 791, 794, n.6, 433 P.2d 479, 481 n.6 (1967). In *Commonwealth* v. *Dell Publications Inc.*, 427 Pa. 189, 233 A.2d 840 (1967), the Pennsylvania Supreme Court in holding Candy not obscene reasoned that it was not hard core pornography which one knows when he sees it. 427 Pa. at 212, 233 A.2d at 853.

Federal courts too have concluded that this phrase constitutes a clear and effective guidepost for obscenity regulation. Thus, in *United States* v. *Hamling*, 481 F.2d 307 (1973), *cert. granted*, 42 U.S.L. Week 3405 (U.S. Jan. 14, 1974), the Ninth Circuit upheld a conviction under 18 U.S.C. § 1461 (1970) because it found the material at issue to be "hard core pornography," "unmistakably hard core pornography," and "hard core pornography with a vengeance." *Id.* at 317. This Court has assigned *Hamling* for argument along with *Jenkins*. These two cases seem to illustrate where a hard core pornography test will draw the line. Any layman or jurist would immediately conclude that the advertising brochure found obscene in *Hamling* is hard core pornography and that Carnal Knowledge is not hard core pornography. As pointed out at p. 18, *supra*, even the majority of the Georgia Supreme Court did not consider Carnal Knowledge hard core pornography.

In *United States* v. *Wild*, 422 F.2d 34 (2d Cir. 1969) *cert. denied*, 402 U.S. 986 (1971), the Second Circuit faced the issue whether expert testimony was required in a prosecution under 18 USC § 1461 (1970). It held that such testimony was not required for the significant reason that obscenity meant hard core pornography and that term was understood by laymen without the need of expert testimony. Chief Judge Lumbard, speaking for the court, said, "Simply stated, hard core pornography . . . can and does speak for itself." 422 F.2d at 36. See also *Luros* v. *United States*, 389 F.2d 200, 205 (8th Cir. 1968).

While a hard core pornography test would give fair warning as to what can be prosecuted, it would not prevent effective regulation where government desires it. States could outlaw the very kind of disgusting filth that people find objectionable and prosecutors would not be placed in the unenviable position of having to prove an extreme negative such as "utterly without redeeming social value." It would prevent frivolous prosecutions such as the

present one, clear the way for successful prosecutions in meritorious cases, and be faithful to the principles of *Miller* and *Slaton*.

POINT IV

The *Miller* standards should be clarified to provide that material which has any literary, artistic, political or scientific value is constitutionally protected.

The Georgia Supreme Court, incredibly, held that Carnal Knowledge, taken as a whole, lacked serious literary, artistic, political or scientific value as those words are used in *Miller*. The most cursory viewing of this high quality, critically acclaimed, award winning film demonstrates that the Georgia court did not understand the meaning of these words intended by the Court.[23] Unfortunately, the frequency of local prosecution and harassment of such other artistic but controversial pictures as Last Tango in Paris[24] indicate that such misinterpretations are not uncommon and will continue unless this Court clarifies the *Miller* standards.

We suggest that the trouble with the third criterion of the *Miller* standard lies in the word "serious." It has no clear or consistent meaning, particularly when referring to such concepts amorphous and controversial in themselves as literature, art, politics and science. Inserting such a qualitative word in the obscenity standards leaves the trier of fact totally at sea and encourages him to insert his own personal tastes and prejudices into the decision-making process. This is a particularly dangerous possibility when one considers that much material prosecuted under criminal obscenity statutes is not familiar or comfortable to most judges and jurors.

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[23] See pp. 8, 11-12, *supra*.

[24] See pp. 15-17, *supra*.

It is difficult enough to determine whether material has literary, artistic, political or scientific value; it seems impossible to determine by any consistent standard whether such value is serious or not serious. As pointed out by Mr. Justice Douglas, concurring in *Memoirs* v. *Massachusetts*:

> "We are judges, not literary experts or historians or philosophers. We are not competent to render an independent judgment as to the worth of this or any other book, except in our capacity as private citizens." 383 U.S. at 427.

It is hard to understand how a judge or juror could determine whether material has "serious" literary, artistic, political or scientific value without guiding testimony by experts in the field. But the Court has stated that such expert testimony is not constitutionally required to make out a case of obscenity. *Kaplan* v. *California, supra,* 413 U.S. at 121; *Paris Adult Theatre I* v. *Slaton, supra,* 413 U.S. at 56.[25] It may be possible that a juror can reflect the impact of material on the average person in his community without expert guidance in evaluating prurient interest or patent offensiveness.[26]. However, the reaction or level of tolerance of the mythical average person is irrelevant in assessing the seriousness of literary, artistic, political or scientific value. That turns on the inherent quality of the work itself. How, for example, can jurors without expert guidance determine whether Ulysses, Lady Chatterley's Lover or Fanny Hill has serious literary value,

[25] We urge the Court to reconsider these statements and hold that the free speech and due process clauses require expert testimony as to value; otherwise a conviction would not be supported by evidence as required by *Thompson* v. *Louisville*, 362 U.S. 199 (1960). *See also Vachon* v. *New Hampshire*, 42 U.S.L. Week 3403 (U.S. Jan. 14, 1974) (per curiam); *Gregory* v. *City of Chicago*, 394 U.S. 111 (1969).

[26] Even here, since material must be judged by contemporary community standards, one would think there must be evidence presented as to what those standards are in order to satisfy the due process clause.

or whether Masters and Johnson or Kinsey have serious scientific value.

The Court in *Miller* carefully explained that it rejected the "utterly without redeeming social value" test of *Memoirs* v. *Massachusetts* because that test never commanded a majority of the Court, placed a virtually impossible burden on the prosecution, and contained the too ambiguous concept of social importance. 413 U.S. at 22-23. However, the Court never explained why it adopted the requirement that material not only have value, but "serious" value, to be constitutionally protected. That word came like Venus full-blown out of the sea. None of the Court's reasons for rejecting the "utterly without redeeming social value" test justify requiring that only works of serious value be protected. That is in essence saying that small, unimportant ideas (i.e. non-serious ideas) are not protected. But *Chaplinsky*, *Roth* and its progeny hold that "all ideas" have the "full protection" of the First Amendment.

We urge, therefore, that the Court clarify the third criterion of its *Miller* standard—by eliminating "serious" —to provide that a work is obscene only if, taken as a whole, it lacks literary, artistic, political or scientific value.

POINT V

Under *Miller*, state-wide community standards should be applied to determine prurience and patent offensiveness, and a national standard applied to determine value.

In *Miller*, the California courts had used the "contemporary community standards of the State of California" to adjudicate the prurient appeal and patent offensiveness of the material in question. See 413 U.S. at 31. This Court

specifically upheld the use of this state-wide standard with respect to these two criteria of the obscenity test. There has been much confusion following *Miller* whether state courts and legislatures must apply state-wide standards for these two prongs or can instead allow the myriad communities within a state to apply their own local standards.[27] There is also confusion whether a local standard is permissable to determine the value of material, or whether a work's inherent worth cannot vary from state to state and thus must be judged by a national standard.

In the instant case, the Georgia Supreme Court applied a local county-wide community standard, apparently for all three criteria of the *Miller* test, with the anomalous result that Carnal Knowledge has been found obscene by the local standard of Dougherty County, although it has been shown—with apparent constitutional protection—in many other Georgia counties.

The issue whether the Constitution requires a national or state-wide standard in determining prurience and patent offensiveness has previously been debated by this Court,[28] culminating in the holding in *Miller* approving a state-wide standard. However, so far as we are aware, the Court's attention has not been focused on the serious dis-

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[27] Compare, *e.g.*, *State* v. *J.-R Distributors, Inc.*, —Wash.2d—, 512 P.2d 1049, 1065 (1973); *People* v. *Heller*, 33 N.Y.2d—, —N.E. 2d— (Case No. 71-184, 1973) (statewide standard required) with *Rhodes* v. *State*, 283 So. 2nd 351 (Sup. Ct. Fla. 1973); *Bruzelton* v. *State*, 50 Ala. App. 723, 282 So. 2d 342 (Crim. App. 1973) (local community standards permissible). See also *Richards* v. *State*, 497 S.W.2d 770, 777 (Tex. Civ. App. 1973) (both statewide and local community standards should be applied).

[28] See *e.g. Jacobellis* v. *Ohio, supra*, 378 U.S. at 192 (opinion of Justices Brennan and Goldberg advocating national standard); *id.* at 200 (Warren, C. J., dissenting, advocating less than a national standard).

order, uncertainty and unfairness which would result if it authorized local political or judicial subdivisions within a state to apply their own separate community standards.

There are over 78,200 separate political subdivisions in the 50 states of the United States.[29] New York State alone has 62 counties, 62 cities, 932 towns and 556 incorporated villages,[30] each one, except for the five counties constituting New York City, with the power to enact and enforce criminal ordinances. N.Y. Mun. Home Rule Law, § 10(1)(a)(11)-(12) (McKinney Supp. 1973). Illinois has 102 counties, 1267 cities and villages and 1432 towns.[31] And similarly, under Illinois law, each municipality is empowered to enact and enforce criminal ordinances. Ill. Ann. Stat., ch. 24, § 11-1-1 (Smith-Hurd 1973). The figures in many other states are comparable.[32]

There are approximately 14,800 motion picture theatres operating in the United States today. They are undoubtedly scattered throughout almost all of these political subdivisions. Of course, in many states these subdivisions overlap; thus, a single theatre could be located within a number of different subdivisions, such as a county and a city, or a county, a township and a village.

It is obvious that if a state were permitted to do so by the Constitution, and chose to define its community standards by political subdivision, an impossible crazy-quilt of conflicting standards would result. Indeed, pictures

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[29] U.S. Dept. of Commerce, Statistical Abstract of the United States 1973, 412.

[30] New York Legislative Manual, 1188-89, 1209-40 (1970).

[31] U.S. Dept. of Commerce, Statistical Abstract of the United States 1973, 412.

[32] For example, California has 57 counties and 407 municipalities; Pennsylvania has 66 counties, 1012 municipalities and 1552 townships; Texas has 254 counties and 981 municipalities; and Georgia has 158 counties and 530 municipalities. *Ibid.*

shown in a theatre located in two or three different political subdivisions would be judged by different standards depending on which subdivision prosecuted the theatre owner.

It is, of course, possible that some states may choose, if constitutionally permitted, to define the appropriate community for these purposes by some demarcation other than political subdivision, such as judicial district. However, this would lead to equally uncertain and absurd results. Generally, judicial districts are not drawn to encompass homogeneous communities but rather for administrative convenience. Thus it would be a fallacy to suggest that there is any identifiable community within a judicial district, and it would be artificial and illusory to expect jurors drawn from different communities within that district to apply a district-wide community standard.

Furthermore, the standard to be applied by a federal district court in prosecutions for violations of federal obscenity statutes would almost necessarily be different from that applied by the state courts if a less than statewide standard is permissible. Federal judicial districts are in most instances not coterminus with state political subdivisions or state judicial districts. Thus if the federal district courts applied the community standards of their districts or divisions, *see United States* v. *Groner*, 479 F.2d 557 (5th Cir. 1973), *vacated and remanded*, 42 U.S.L. Week 3243 (U.S. Oct. 15, 1973), and if state courts applied community standards of some different geographic area, different standards would govern federal and state prosecution of the same material disseminated in the same place.[33] For example, a theatre owner showing a picture in Miami

[33] This need not be a problem if state courts are limited to state-wide standards since a federal court could then apply a community standard encompassing the state within which it sits and, of course, federal judicial districts do not cross state lines. The only way to insure federal-state consistency is to require statewide community standards for both.

could be prosecuted under a Florida obscenity statute in a state court of local jurisdiction whereby the picture in question would be judged by the standards of Miami or Dade County, *see* n.27 *infra*, and also prosecuted under federal statutes whereby the picture would be judged by the standards of the Southern District of Florida which includes 11 additional counties, including rural areas such as the Everglades. *See* 28 U.S.C. § 89(c) (1970). Likewise, a federal prosecution for showing an allegedly obscene movie in Fairfax, Virginia would not be governed by the standards of Fairfax County or the city of Fairfax—the standards which might govern if the prosecution were brought under state law—but rather by the community standard of the entire Eastern District of Virginia, encompassing 52 counties, many of which comprise sparsely populated rural communities. *See* 28 U.S.C. § 127(a) (1970).

It takes no great prescience to realize that such a balkanized application of the United States Constitution will inevitably destroy any pretense of a uniform system of criminal justice. Furthermore, it will seriously impinge upon First Amendment rights of free expression. For such balkanization will make it impossible for a person disseminating movies or written material to know in advance whether that act constitutes the exercise of First Amendment rights or the commission of a crime in any particular location. Indeed, even the fact that a specific book or motion picture has been held to be protected speech by one court can give no assurance that showing it will not be held a criminal act in another court a few miles away. This in turn will have a serious chilling effect.

As we noted at p. 5, *supra*, it took 20 months to produce Carnal Knowledge at a cost of $5,400,000. Inevitably producers of motion pictures will, given the economics of the industry, feel forced to make films of minimal offensiveness to assure them of safe passage in the most restrictive of local communities. With this much effort and money

at stake, it is inconceivable that a producer would even approach the point where his product might be held obscene by any local community's standards. Nor is it possible to make different versions of a picture to play in different locations, particularly when the number and variety of local communities is so vast. The same, of course, would be true for authors and publishers of written material.

Thus, with respect to determining whether material appeals to the prurient interest or is patently offensive we urge the court to hold that only state-wide standards can be applied under *Miller*.

The Court in *Miller* did not reach the question whether anything less than a national standard may be used to judge the value of material at issue. While it may be true that prurience and patent offensiveness will vary from state to state because they turn on the impact of material on the average member of a community, the literary, artistic, political and scientific value of material cannot so vary because that quality turns on the inherent qualities of the work itself. Ulysses and Lady Chatterley's Lover have undisputed literary worth regardless of the feelings they may arouse in any particular local community, *cf.*, *Roth* v. *United States, supra*, 354 U.S. at 506 (Harlan, *J.*, dissenting), and Carnal Knowledge cannot lose its artistic merit when it crosses the Dougherty County line. There is no justification for judging the value of a work by reference to state or local community standards; that judgment can only be made against the standards of our civilization as a whole.

The verdict of the Dougherty County jury in this case demonstrates that applying any parochial standard of value violates a fundamental concept of the First Amendment—that it protects free speech rights to communicate ideas wherever one may go in this nation, regardless of how unpopular they may be in any local community. In short, we have a national constitution.

Unless this aspect of *Miller* is clarified we will continue to see a distressing growth of criminal obscenity convictions obtained by local prosecutors because they do not accept standards of literary, artistic, political or scientific value recognized by the nation at large. Incongruously, many such prosecutions will be aimed at the finest and most innovative products of American artists and writers.

Conclusion

The decision of the Georgia Supreme Court should be reversed; the Court should hold that the dissemination of Carnal Knowledge is protected by the First Amendment as a matter of constitutional fact; that material is protected by the First Amendment unless, taken as a whole, it is patent and obvious hard core pornography and lacks any literary, artistic, political or scientific value (in addition to appealing to the prurient interest and being patently offensive); that prurience, patent offensiveness and hard core pornography should be judged by state-wide community standards; and that literary, artistic, political or scientific value should be judged by a national standard.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1973
No. 73-557

BILLY JENKINS,

Appellant,

vs.

STATE OF GEORGIA,

Appellee.

On Appeal From the Supreme Court of Georgia.

Brief Amicus Curiae for Adult Film Association of America, Inc.

Interest of the Amicus.

The Adult Film Association of America files this Brief as *amicus curiae* with the written consent of both appellant and appellee.

The Adult Film Association of America is a membership corporation consisting of producers, distributors and exhibitors of motion picture film, directed primarily at adult audiences.

Amicus curiae has a substantial interest in the determination of the issues presented by this case. Films produced, distributed and exhibited by Association members find their way into every corner of our country, and *amicus* is concerned with the standards pursuant to which motion picture films may be judged. *Amicus* believes that the new tests of obscenity an-

nounced in *Miller*, and largely adopted by the Georgia Supreme Court, fail to provide either "fair notice" or "concrete guidelines" as to what motion picture films are criminally obscene. Accordingly, members of the Association, all of whom are law-abiding citizens, face the possibility of criminal prosecution under standards which are, it is respectfully submitted, essentially meaningless. In addition to being concerned about its members, *amicus* is opposed to censorship, believing it to be the sworn enemy of freedom and liberty. The Association is deeply committed to the principles of freedoms of speech and press upon which our country was built and prospered.

Summary of Argument.

1. Georgia has defined obscenity by amalgamating the abandoned *Roth, Memoirs* test with the *Miller* test. The Georgia standards for identifying obscenity fail to provide either "fair notice" or "concrete guidelines" as to what motion picture films are criminally obscene, since those standards rely on such indefinite concepts as "prurient interest", "patent offensiveness", "utterly without redeeming social value" and "serious value". These standards are as uncertain as "the unknown substance of the Milky Way". Transferring from the Court to the jury "the awesome task of making case-by-case at once the criminal and constitutional law" would lighten the burden of this Court but it does not cure, and indeed exacerbates, the vice of vagueness. "*Ad hoc* legislation" by a jury in this area constitutes a denial of due process and is the functional equivalent of an *ex post facto* law.

2. To compensate for the inherent and inevitable vagueness involved in defining obscenity, due process of

law requires that there be a prior judicial determination of a work's obscenity before a State initiates criminal proceedings. In order to minimize the conflict with First Amendment rights, the civil proceedings must be hedged about with adequate procedural safeguards, including the right of a determination by a jury as to the obscenity of a challenged film.

3. Allegedly obscene material should not be suppressed unless such material not only offends state standards, but also the standards of the geographic area from which a particular jury is drawn. Since it is only "obscenity" that is excluded from constitutional protection, the question of whether a particular work is obscene necessarily implicates First Amendment questions. Any restriction on the right of citizens to freely express themselves, and the right of the public to know, must have at the very least a state justification; it cannot depend for its validity upon the capriciousness or whim of a "local community". However, if a jury drawn from a particular geographic area is of the view that material does not offend the standards of the particular community, then in the light of First Amendment guarantees such community should have its way and be permitted to view and see and hear what the community deems tolerable. In brief, a local community may tolerate what the State generally does not, but a local community should not be permitted to suppress what the State tolerates.

4. The Court should make clear, it is submitted, that the phrase "literary, artistic, political or scientific" was not intended to delineate strict categories of ideas which alone are protected by the First Amendment. The Constitution gives broad protection to the dissemination of ideas. Freedom of expression is deemed im-

portant for the enhancement of human dignity, to enable the people to govern themselves, to alleviate individual and societal tensions, and to assure that the thinking process of the community will in no sense be mutilated. Ideas which are informational, educational, and entertaining have been recognized as important by this Court, and indeed, the Court has held that the rights of free speech and a free press are not confined to any field of human interest. Therefore, the Court should clarify its ruling in *Miller* to the extent of enunciating the principle that the First Amendment protects works which, taken as a whole, have tangible "literary, artistic, political, scientific, informational, educational, or entertaining ideas, or any other ideas of human interest".

ARGUMENT.

I

Georgia Code Ann. Section 26-2105, on Its Face and as Construed and Applied by the Supreme Court of Georgia, Fails to Provide Either "Fair Notice" or "Concrete Guidelines" as to What Motion Picture Films Are Criminally Obscene.

A. Seventeen years ago, Judge Jerome Frank, in a concurring opinion, wrote what is probably the best judicial essay on obscenity. *United States v. Roth,* 237 F.2d 796 (2 Cir. 1956). After calling "obscenity" an exquisitely vague crime, he went on to say: "The exquisite vagueness of the word 'obscenity' is apparent from the way the judicial definition of that word has kept shifting. . . . A standard so difficult for our ablest judges to interpret is hardly one which has a 'well-settled' meaning, a meaning sufficient adequately to advise a man whether he is or is not committing a crime if he mails a book or picture." (237 F.2d at 826).

In *Roth v. United States,* 354 U.S.476, this Court rejected Judge Frank's suggestion that the obscenity statute there at issue was unconstitutionally vague, saying:

> " . . . [T]he Constitution does not require impossible standards; all that is required is that the language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. . . . These words, applied according to the proper standard for judging obscenity, already discussed, give adequate warning of the conduct proscribed and mark . . . boundaries sufficiently distinct for judges and juries fairly to administer the law. . . ." (354 U.S. at 491.)

The "tortured history of the Court's obscenity decisions" attests to the accuracy of Judge Frank's assertion that the crime of "obscenity" is indeed exquisitely vague. Justice Stewart, concurring in *Jacobellis v. Ohio*, 378 U.S.184, observed that it is "possible to read the Court's opinion in Roth . . . in a variety of ways. In saying this, I imply no criticism of the Court, which . . . was faced with the task of trying to define what may be indefinable". (378 U.S. at 197). Some ten years after this Court decided *Roth*, Justice Harlan said: "[A]nyone who undertakes to examine the Supreme Court's decisions since *Roth* which have held particular material obscene or not obscene would find himself in utter bewilderment." *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S.676, 707. It is no overstatement to assert that every Justice faced with the problem of defining obscenity has recognized its inherent vagueness.

In *Miller v. California*, 93 S.Ct.2607, 2610, Chief Justice Burger spoke of "the intractable obscenity problem". Recognizing that the question of obscenity had evoked "a variety of views among the members of the Court unmatched in any other course of constitutional adjudication", the Chief Justice went on to say: "This is not remarkable, for in the area of freedom of speech and press the courts must always remain sensitive. . . . This is an area in which there are few eternal verities." (93 S.Ct. at 2614). Chief Justice Burger asserted that as a result of this vagueness, "this Court was compelled to embark on the practice of summarily reversing convictions for the dissemination of materials that at least five members of the Court, applying their separate tests, found to be protected by the First Amendment. . . . The *Redrup* procedure has cast

us in the role of an unreviewable board of censorship for the 50 States, subjectively judging each piece of material brought before us." (93 S.Ct. at 2614, n. 3).

Justice Brennan, dissenting in *Paris Adult Theatre I v. Slaton*, 93 S.Ct.2628, made the same point. After stating that the Court had failed to formulate a satisfactory standard for separating protected from unprotected speech, Justice Brennan went on to say that out of necessity the Court "resorted to the *Redrup* approach, which resolves cases as between the parties, but offers only the most obscure guidance to legislation, adjudication by other courts, and primary conduct. By disposing of cases through summary reversal or denial of certiorari we have deliberately and effectively obscured the rationale underlying the decision. It comes as no surprise that judicial attempts to follow our lead conscientiously have often ended in hopeless confusion." (93 S.Ct. at 2647).

Justice Brennan, the architect of the Court's obscenity decisions from *Roth* to *Memoirs*, stated the vagueness problem did not flow primarily from the Court's failure to reach a consensus on any one standard.[1] The real problem, he said, was that it was simply impossible

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[1]Indeed, as Justice Brennan saw it, the differences between the concededly vague *Memoirs* test and the *Miller* test "are, for the most part, academic" (Brennan, dissenting in *Paris*, 93 S.Ct. at 2653). The *Miller* rephrasing of *Memoirs*, Justice Brennan said, contains all the same difficulties and ambiguities.

> "The Court evidently recognizes that difficulties with the *Roth* approach necessitate a significant change of direction. But the Court does not describe its understanding of those difficulties, nor does it indicate how the restatement of the *Memoirs* test is in any way responsive to the problems that have arisen. In my view, the restatement leaves unresolved the very difficulties that compel our rejection of the underlying *Roth* approach. . . ." (Justice Brennan, dissenting in *Paris*, 93 S.Ct. at 2654).

to define obscenity without impinging on First Amendment rights. "[A]fter 15 years of experimentation and debate, I am reluctantly forced to the conclusion that none of the available formulas, including the one announced today, can reduce the vagueness to a tolerable level. . . . Any effort to draw a constitutionally acceptable boundary . . . must resort to such indefinite concepts as 'prurient interest', 'patent offensiveness', 'serious literary value' and the like. The meaning of these concepts necessarily varies with the experience, outlook, and even idiosyncrasies of the person defining them. . . . [W]e are manifestly unable to describe [obscenity] in advance except by reference to concepts so elusive that they fail to distinguish between protected and unprotected speech. . . . I need hardly point out that the factors which must be taken into account are judgmental and can only be applied on a 'case-by-case, sight-by-sight basis' ". (Justice Brennan, dissenting in *Paris*, 93 S.Ct. at 2647, 2648).

Even the most painstaking efforts to determine in advance whether certain sexually oriented expression is obscene "must inevitably prove unavailing. For the insufficiency of the notice compels persons to guess not only whether their conduct is covered by a criminal statute, but also whether their conduct falls within the constitutionally permissible reach of the statute. The resulting level of uncertainty is utterly intolerable . . . because it makes 'bookselling [and film exhibiting] . . . a hazardous profession. . . .' " (Justice Brennan, dissenting in *Paris*, 93 S.Ct. at 2649).

As a result of the Court's inability to formulate a satisfactory standard with predictable application to any given work, Justice Brennan stated, "there is no proba-

bility of regularity in obscenity decisions by state and lower federal courts." (Justice Brennan, dissenting in *Paris*, 93 S.Ct. at 2652).

B. Georgia has amalgamated the *Roth-Memoirs* test with *Miller*. On October 30, 1973, in *Slaton v. Paris Adult Theatre I*, ... Ga. ...., ... S.E.2d .... (Appendix AA to Appellant's Reply to Appellee's Motion to Dismiss or Affirm), the Georgia Supreme Court authoritatively set forth what is criminally obscene in Georgia. While it is not entirely clear that appellant herein was convicted under the said test, or that his conviction was affirmed thereunder, *amicus* assumes that the conviction and affirmance were in accordance with the guidelines articulated by the Georgia Supreme Court in the *Paris* case on October 30, 1973. On that assumption, the jury found (and the Georgia Supreme Court agreed) that, applying contemporary standards of the State of Georgia, and considering the film as a whole, the average person in the State of Georgia would find:

(a) that the predominant appeal of "CARNAL KNOWLEDGE" is to a prurient interest in sex; and

(b) "CARNAL KNOWLEDGE" is a patently offensive depiction or description of sexual conduct embodying a shameful or morbid interest in nudity or sex, and going substantially beyond customary limits of candor in the State of Georgia in describing or representing nudity or sex; and

(c) "CARNAL KNOWLEDGE", taken as a whole, lacks serious artistic, political or scientific values; and

(d) "CARNAL KNOWLEDGE", taken as a whole, is utterly without redeeming social value.

Initially, it should be observed that three of the seven Georgia Supreme Court Justices saw the film differently. Justice Gunter, dissenting, stated: "Having viewed this film with the other members of the Court, I must say, quite *subjectively* of course, that it is inconceivable to me that this work can be relegated to that area of . . . performing expression which falls outside of the protection of the First Amendment to the Constitution of the United States." (Jurisdictional Statement, Appendix A, 5) (emphasis added). Justice Gunter stated that his experience with this case taught him "that the MILLER majority's assumption that courts can distinguish commerce in ideas that is protected from commercial exploitation of obscene material that is not protected, is a too optimistic assumption. The instant case is the proof that is in the pudding; material is pornographic and unprotected in the subjective mind and senses of one judge; and that same material has serious literary or artistic value in the subjective mind and senses of another judge. . . ." (J.S., Appendix A, 12).

As noted above, the Georgia Supreme Court authoritatively construed its obscenity statute in *Slaton v. Paris Adult Theatre I*, ... Ga. ...., ... S.E.2d .... (Appendix AA to Appellant's Reply to Appellee's Motion to Dismiss or Affirm). Justice Gunter concurred reluctantly, and only because he felt bound by this Court's majority decisions in *Paris* and *Miller*. "Were it not for those two recent decisions", he said, "I would hold that the Georgia statute . . . which permits the State to suppress 'obscene materials' is vague and overly broad so as to be constitutionally unenforceable."

In Justice Gunter's view, the standards for identifying obscenity in Georgia failed to "come even close to

meeting the due process requirements" that the crime be "clearly defined by the State so that a reasonable man can see the line of demarcation between protected expression and suppressed expression." In Justice Gunter's view, a reasonable man "or, for that matter, seven supposedly reasonable judges utilizing objective criteria which in the last resort end up being really subjective criteria, cannot distinguish constitutionally protected material from material that is unprotected by the First Amendment. The net result of the MILLER (obscenity concept) case is that this Court acts as a seven-man board of censors in the State of Georgia, and the Supreme Court of the United States acts as a nine-man board of censors throughout the nation, with a majority of this Court determining what is constitutionally protected or unprotected in Georgia and a majority of the Justices of the Supreme Court of the United States determining what is constitutionally protected or unprotected at the national level."

Justice Gunter expressed a similar view dissenting in the case at bar, saying:

> "As the MILLER decision said, the history of the Supreme Court's obscenity decisions has been 'somewhat tortured'. . . . I would go one step further and say that the Supreme Court's decisions in this area, handed down during the recent and relatively short period of the First Amendment's entire history, have made it impossible for a dealer in such material to make a determination, with any degree of certainty, as to whether the material falls within the protection of the First Amendment or falls outside of its protection." (Appendix A of J.S. 5-6).

As noted above, the court below utilized the "prurient interest" test, the "patently offensive" test, the "utterly without redeeming social value" test, and the "serious . . . value" test to separate protected from unprotected speech. As *amicus* shows immediately below, however, these tests are essentially meaningless and intolerably vague.

1. Appeal to the "Prurient Interest" of the "Average Person".

The first test a trier of fact must utilize in Georgia is whether, applying contemporary Georgia standards, and considering the film as a whole, the average person would find its predominant appeal is to a prurient interest in sex. In *Miller*, Chief Justice Burger explained that the primary concern with requiring a jury to apply the "average person" test is to be certain that the prurient interest of the material "will be judged by its impact on an average person, rather than a particularly susceptible or sensitive person—or indeed a totally insensitive one." (93 S.Ct. at 2620).[3]

The prurient interest test is the basic definition of what is obscene originally adopted by *Roth v. United States*, 354 U.S. at 487. Yet the Court has never provided even the slightest guidance regarding what is a

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[3]In the case at bar, an Albany jury, without evidence, was required to determine whether "CARNAL KNOWLEDGE" appealed to the prurient interest of the average person in the State of Georgia. It is almost certain that the jurors themselves were not a fair cross-section of the average person in the entire State of Georgia. See, *United States v. Roth*, 237 F.2d at 822 (Judge Frank, concurring). See also, *Williams v. Florida*, 399 U.S.78, 100-102. If the 12 jurors were not themselves "the average person" and they had no evidence of what appeals to the prurient interest of the average person, how could they find that "CARNAL KNOWLEDGE" did in fact appeal to the prurient interest of the average person in the State of Georgia, other than by guess, surmise or prejudice?

prurient sexual interest, as compared with other sexual interests which may be appealed to with full constitutional protection. All we know is that a "prurient" interest is different than a "sexual" interest. In *Roth v. United States,* 354 U.S.476, 487, the Court said: "[S]ex and obscenity are not synonymous. . . . The portrayal of sex . . . is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press. Sex, a great and mysterious motive force in human life has indisputably been a subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern . . .".

The Court has attempted to define "prurient" on only one occasion—the 1954 *Roth* opinion—and its treatment could hardly have been more confusing. In that case, the Court said that material appeals to prurient interest if it has "a tendency to excite lustful thoughts." (354 U.S. at 487, n.20). The Court also said (quoting from *Webster's Dictionary*) that prurient was equivalent to "itching; longing; uneasy with desire or longing." (*Ibid.*) Finally the Court referred with approval to the Model Penal Code definition of prurient interest as "a shameful or morbid interest in nudity, sex, or excretion." (*Ibid.*)

It is reasonably clear that "lust" is not the same as "uneasy desire" or "longing". And, surely, none of these feelings is automatically equivalent to "shame" or "morbidity". For example, a film which would cause a married person to feel sexual longing or desire—even lust—for his or her spouse would certainly not also cause feelings of shame or morbidity if the marriage relationship was even remotely normal. Must a theatre owner exhibiting a film dealing with sex make sure that

the film does not arouse "lust", or cause "uneasiness or longing", or "shame or morbidity", in those who patronize his theatre? Must he make certain that his films do not cause *any* of these emotions, that they do not cause *all* of them at once, or what?

The court below (following the lead of this Court) repeats and relies upon the term "prurient", but it makes no attempt to describe which of these widely different reactions it means to include. If a theatre owner is warned not to exhibit films which appeal to a "prurient interest", he is entitled to, but does not get, "fair notice" and "concrete guidelines" as to what is meant by the term "prurient".

The lack of meaning and clarity in the concept of "pruriency" is, moreover, quite small in comparison to the utter impossibility of divining what will arouse the prurient interest (whatever that means) of the *average person*. The court below assumed that there is some widely shared (and therefore generally known) "average" societal reaction to certain types of sexual materials. But, as the case at bar demonstrates, this assumption is erroneous. "CARNAL KNOWLEDGE" was one of the most popular films in the year of its release. It was viewed by millions of persons who showed no sign of morbidity, shame, lust or sexual itching. Yet, the jury that convicted and four members of the court below, found that "CARNAL KNOWLEDGE" appeals to the prurient interest of the average person.

The National Commission on Obscenity and Pornography found as the result of numerous studies into the evaluation by Americans of extremely explicit sexual materials, that there was "very little consensus among people regarding either the 'arousingness' or the 'offen-

siveness' of a given sexual depiction. A wide distribution of judgments . . . occurs, for example, for depictions of female nudity with genitals exposed, for explicit depictions of heterosexual intercourse, and for graphic depiction of oral-genital intercourse. In addition, judgments differ among different groups: Males as a group differ from females . . .; the young differ from the old; the college-educated differ from those with only a high school education; frequent church attenders differ from less frequent church attenders." (*Commission Report*, p. 41). Put another way, "what may not be provocative to one person may well be to another." *Rowan v. Post Office Dept.*, 397 U.S.728, 737 (opinion for the Court by Chief Justice Burger).

Which then among these wholly different and widely shared present-day judgments about and reactions to the most extremely explicit sexual materials is the reaction of the of the "average person"? The fact is, of course, that there no longer is any consensus of "average" reaction to explicit sexual materials, if there ever was such consensus. Vastly differing tastes and reactions cannot be "averaged" like height or weight or family income.

In *Miller*, this Court recognized that, taking the Nation as a whole, "average" standards of taste and reaction regarding sexual materials, are "hypothetical and unascertainable". This vice of vagueness is not cured by authorizing the application of statewide, rather than national, standards. A State such as Georgia, whose leading city, Atlanta, is one of the most cosmopolitan in the world, and one of the most fast growing ones, contains as broad a spectrum of age, occupation, educational background, religious beliefs and nonbeliefs—and reactions to explicit sex as the Nation as a

whole. In *Miller v. California*, the Court correctly notes that "[p]eople in different States vary in their taste and attitudes", but tastes do not suddenly become uniform when one crosses a state border. People in the *same* State also vary in their tastes and attitudes. It is highly probable that residents of Atlanta, Georgia have more in common with the residents in New York City than they do with the residents of Albany, Georgia. The reactions of the "average" Georgian to a sexual depiction are thus as "hypothetical and unascertainable" as the reactions of the "average" American. A test for obscenity which requires a prediction as to whether the nonexistent sexually "average" Georgian will have a "prurient" reaction to a given sexual depiction provides neither "fair notice" nor "concrete guidelines".

What Justice Black said seven years ago of the "prurient interest" test is still true today, after *Miller*: "[I]t seems quite apparent to me that human beings serving . . . as judges or jurors, could not be expected to give any sort of decision on this element which would even remotely promise any kind of uniformity in the enforcement of this law. What conclusion an individual . . . would reach about whether the material appeals to 'prurient interest in sex' would depend . . . upon the [individual's] . . . personality, habits, inclinations, attitudes and other individual characteristics. . . . In the final analysis, the submission of such an issue as this to a judge or jury amounts to practically nothing more than a request from the judge or juror to assert his own personal beliefs about whether the matter should be allowed to be legally distributed. . . ." *Ginzburg v. United States*, 383 U.S.463, 478-479.

2. "Patently Offensive", in Light of "Contemporary Community Standards".

Under the formulation offered by the court below, films of sexual conduct which appeal to the "average", "prurient interest", are nonetheless constitutionally protected, unless they are, in addition, "patently offensive" in light of standards in the State of Georgia. But how is a threatre owner to know in advance whether the film he exhibits will be patently offensive to the community consisting of the State of Georgia? Does the community of Georgia find a work offensive within the meaning of the opinion of the court below, when a bare majority are repelled by it, when a substantial majority are repelled (say, 70% or 80%), or only when there is an overwhelming consensus of repulsion (say, 95%)?

And even if an answer were given to these questions, the overwhelming problem of vagueness would still lie in the necessity of determining, in advance, whether the requisite percentage of a given community will, in fact, be offended by a particular work, when the particular tastes and sensitivities of the members of that community cannot possibly be known to an exhibitor before he exposes himself to criminal liability. As noted above, in the discussion of the meaning of the "prurient" interest of the "average" person, all of the research carried out to date shows, contrary to what may have been assumed, that Americans are entirely unpredictable with regard to whether they find even the most "hard core" sexual depictions offensive or attractive and a substantial number do not take offense at any category of hard core depictions. In addition, an extensive national survey of American public opinion undertaken by the Obscenity Commission showed

that in 1970 approximately 50% of adults believed that it was "all right" to have any and all so-called hard core pornography available to adults who wish to read or view such materials privately. (*Commission Report*, 352-353). The materials to which this survey referred included pictures mainly for the purpose of showing sex organs, pictures of men and women having sexual intercourse, pictures of mouth-sex organ contact between men and women, pictures of homosexual activities, and even pictures of sex activities which include whips, belts or spankings. Where in this blanket approval by a majority of the consensual distribution of the most explicit materials is a theatre owner to find guidance about what particular film will actually offend the requisite percentage (whatever it is) of the community? In view of this data, it is clear that an exhibitor of a motion picture film is not afforded "fair notice" regarding the line between the obscene and the constitutionally protected, so long as obscenity is made to turn on the "community's" sense of offense.

Justice Black, dissenting in *Ginzburg v. United States*, 383 U.S. at 480, made this point, saying that even if there was agreement as to the relevant community pursuant to which the obscenity of material is to be judged, "who is capable of assessing 'community standards' on such a subject? . . . So here again the guilt or innocence of a defendant charged with obscenity must depend in the final analysis upon the personal judgment of attitudes of particular individuals and the place where the trial is held."

In *Winters v. New York*, 333 U.S.507, 514, this Court condemned as unconstitutionally vague a state statute which, as construed, measured the criminality of publications by invoking the "experience of the com-

munity as to what types of books are likely to bring about the corruption of public morals or other analogous injury to the public order".

3. The "Utterly Without Redeeming Social Value" Test and the "Serious Artistic . . . Value" Test.

A film which appeals to prurient interest and is patently offensive is nevertheless constitutionally protected under the Georgia test of obscenity, unless, additionally, it is found to be "utterly without redeeming social value" and lacking in "serious artistic . . . value". In *Miller*, the Court rejected the "utterly without redeeming social value" test as unworkable and ambiguous. Speaking of the "redeeming social value" test, Justice Black, dissenting in *Ginzburg*, 383 U.S. at 480, said:

> "This element seems to me to be as uncertain, if not even more uncertain, than is the unknown substance of the Milky Way. If we are to have a society as contemplated by the Bill of Rights, then I find little defense for leaving the liberty of American individuals subject to the judgment of a judge or jury as to whether material that provokes thoughts or stimulates desire is 'utterly without redeeming social value. . . .' Whether a particular treatment of a particular subject is with or without social value in this evolving, dynamic society of ours is a question upon which no uniform agreement could possibly be reached among politicians, statesmen, professors, philosophers, scientists, religious groups or any other type of group. A case-by-case assessment of social values by individual judges and jurors is, I think, a dangerous technique for government to utilize in determining whether a man stays in or out of the penitentiary."

The "serious artistic . . . value" test is, it is respectfully submitted, equally ambiguous and unworkable, or almost so. This Court has repeatedly had occasion to comment on the difficulty, if not the impossibility, of separating "serious" from "nonserious" communication for First Amendment purposes.

In *Stanley v. Georgia*, 394 U.S.557, 566, the Court, citing *Winters v. New York*, 333 U.S.507, stated that it is irrelevant "that obscene materials in general, or the particular films before the Court, are arguably devoid of any ideological content. The line between the transmission of ideas and mere entertainment is much too elusive for this Court to draw, if indeed such a line can be drawn at all." In *Winters v. New York*, 333 U.S. at 510, the Court rejected the suggestion that the constitutional protection for a free press applies only to the exposition of ideas. "Everyone is familiar with instances of propaganda through fiction. What is one man's amusement teaches another's doctrine. Though we can see nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best of literature." See also, *Burstyn v. Wilson*, 343 U.S.495, 501; *Cohen v. California*, 403 U.S.15, 24, 26.

An illustration of the difficulty of separating protected from unprotected speech can be found in a recent event reported in the Los Angeles Times (Jan. 12, 1974). It appears that United States Secret Service agents took the printing plates and negatives of a cartoon by Paul Conrad which depicted $1.00 bills that carried the notation "$1.00 per gallon" and a caption that read "Administration's Gasoline Ration Stamps." The Secret Service said that the cartoons violated the

United States counterfeiting statute that forbids photographing or reproducing a likeness of United States currency, except for "newsworthy" purposes. The Secret Service agent in charge is quoted as saying: "[O]bviously . . . there's no intent to counterfeit", but added that the Government was concerned that if the plates "were stolen, lost or got into the wrong hands, they might be used elsewhere for the wrong purposes." At Secret Service headquarters in Washington, Spokesman John Murray is quoted as saying: "Obviously we're not looking to make a big issue of this thing. It is a violation of the law. What happens in most of these cases, we request the newspaper or magazine . . . . to cease from continuing to produce this. . . . The U.S. attorney in Seattle (where the cartoon had appeared in a local newspaper) brought the cartoon to our attention and said he felt it was a violation. We agreed with him and went out to Salt Lake City and retrieved the mats, plates and negatives." Paul Conrad is quoted as saying: "It's idiotic. I'll be happy to plead guilty if any one of the Treasury agents can go out and cash one."

Another illustration of the virtual impossibility of separating serious publications from nonserious ones is to be found in *Grigsby v. State,* Tennessee Court of Criminal Appeals, 14 Crim.Law.Rep. 2134 (Nov. 14, 1973), wherein, by a 2-1 decision, the court found "obscene" magazines containing many explicit photographs of intercourse, oral copulation, and the like. Judge Galbreath, dissented, saying: "I do not find the publications obscene, I have read them all and I enjoyed reading them. In spite of advancing years, global travels and extensive reading on the subjects dealt with, I learned much from many of the articles that I did not know before . . . many of which con-

tained informative and entertaining subjects I found to be of significant value. Other parts of the exhibits I found trite, boring and offensive to my personal tastes, but this did not lessen the value I found in the other portions nor my realization that many others would find these portions personally suitable to their tastes. I believe such literature has constitutional protection beyond our power to set aside."

The "proof" that serious and nonserious films cannot be separated by this Court's *Miller* test is to be found in the case at bar. As Justice Gunter said in his eloquent dissenting opinion: "The instant case is the proof that is in the pudding; material is pornographic and unprotected in the subjective mind and senses of one judge; and that same material has serious literary or artistic value in the subjective mind and senses of another judge. . . ." (J.S., Appendix A, 12).

In *Winters v. New York,* 333 U.S.507, 517, the Court, in declaring the New York statute there involved unconstitutionally vague, cited with approval *State v. Klapprott,* 127 N.J.L. 395, 22 A.2d 877, and quoted from the said case as follows:

> ". . . That the terms 'hatred,' 'abuse,' 'hostility,' are abstract and indefinite admits of no contradiction. When do they arise? Is it to be left to a jury to conclude beyond reasonable doubt when the emotion of hatred or hostility is aroused in the mind of the listener as a result of what a speaker has said? Nothing in our criminal law can be invoked to justify so wide a discretion. The Criminal Code must be definite and informative so that there may be no doubt in the mind of the citizenry that the interdicted act or conduct is illicit."

The Georgia statute, as authoritatively construed by the Georgia Supreme Court, is also "abstract and indefinite". A theatre owner, such as appellant herein, has no way of knowing in advance what film a jury might find appeals to the prurient interest of the average person; is patently offensive to the standards of the State of Georgia; is utterly without redeeming social value; and lacks serious artistic value.

C. Justice Brennan, dissenting in *Paris* (93 S.Ct. at 2652), spoke of "the awesome task of making case-by-case at once the criminal and constitutional law" in the area of obscenity. In the case at bar, the State argues that this awesome task should be placed in the hands of a jury, virtually without limitation. In its Motion to Dismiss or Affirm, appellee asserts that the jury found the film "CARNAL KNOWLEDGE" obscene by using its common sense. "Had appellant actually read the statutes, and given them the same common sense reading . . . he would have arrived at the obvious conclusion that they prohibit obscene material such as is here involved, to wit: the movie, 'Carnal Knowledge' " (p. 15). Appellee then argues that this finding is, for all practical purposes, final.

> "The intent of this Court, as enunciated in *Miller,* is clear: this Court will not reverse the jury's decision on the facts—and the question raised by appellant is one, purely and simply, of fact. . . . Any other decision by this Court, such as is urged by the appellant, says that the trial by jury, . . . becomes a superfluous, formal waste of time and money of the involved parties. Further, acceptance of appellant's position by this Court is clearly an adoption by this Court of the role of final review board for all of the several thousand new and po-

> tentially questionable films released each year. . . . Appellee would suggest that . . . this Court never meant to suggest that this role [of determining what is obscene] should be anything but that attributed to the jury" (pp. 24-25).

Appellee apparently has adopted the view first articulated by Judge Learned Hand in *United States v. Levine*, 83 F.2d 156, 157 (2 Cir. 1956). Judge Hand there stated that obscenity "is a function of many variables, and the verdict of the jury is not the conclusion of a syllogism of which they are to find only the minor premises, but really a small bit of legislation ad hoc. . . ." There can never be, he said, "constitutive principles for such judgments, or indeed more than cautions to avoid the personal aberrations of the jurors." (83 F.2d at 157).

In 1957, Judge Hand returned to the same theme. Speaking at the proceedings of the American Law Institute during the deliberation of Model Penal Code Tentative Draft No. 6, dealing with obscenity, Judge Hand said obscenity "cannot be defined", and he therefore objected to "an attempt to define the indefinable" (34 A.L.I. Proceedings, 191 [1957]). Judge Hand concluded that

> "we must not try to be definite. We must leave it to the jury to say, is this obscene? Is it contrary to what you all think ought not to be? . . . The attempt to mix in with this an objective standard . . . seems to me to be absurd." (*Id.* 192).

While it may be that a jury can "legislate" in this area better than a judge, it is surely a denial of due process, and the functional equivalent of an *ex post facto* law, to subject an accused to criminal punish-

ment under "legislation" enacted by the jury that convicts a defendant. See, *Bouie v. City of Columbia*, 378 U.S.347; *Douglas v. Bouder*, 93 S.Ct.2199; *Rabe v. Washington*, 405 U.S.313. See also, Justice Black's dissenting opinion in *Ginzburg v. United States*, 383 U.S. 463, 478, 480. Justice Brennan, dissenting in *Paris* (93 S.Ct. at 2657), stated that while turning the question of obscenity over to the jury would lighten the burden of this Court in dealing with such cases,

> "it would neither offer nor produce any cure for the . . . vices of vagueness. Far from providing a clearer guide to permissible primary conduct, the approach would inevitably lead to even greater uncertainty and the consequent due process problems of fair notice. And the approach would expose much protected, sexually oriented expression to the vagaries of jury determinations. Cf., *Herndon v. Lowry*, 301 U.S.242, 263 (1937). Plainly, the institutional gain would be more than offset by the unprecedented infringement of First Amendment rights."

Justice Douglas, dissenting in *Miller*, said (93 S.Ct. at 2624):

> "In *Bouie v. City of Columbia*, 378 U.S.347, we upset a conviction for remaining on the property after being asked to leave, while the only unlawful act charged by the statute was entering. We held that the defendants had received no 'fair warning, at the time of their conduct' while on the property 'that the act for which they now stand convicted was rendered criminal' by the state statute. *Id.*, at 355. The same requirement of 'fair warning' is due here, as much as in

Bouie. The latter involved racial discrimination; the present case involves rights earnestly urged as being protected by the First Amendment. In any case—certainly when constitutional rights are concerned—we should not allow men to go to prison or be fined when they had no 'fair warning' that what they did was criminal conduct."

In *Bouie*, the Court held that where vague statutes are concerned the vagueness cannot "be cured in a given case by a construction in that very case placing limits on the statute." As the Court pointed out, one of the vices of a vague statute is that it gives inadequate guidance to the individual whose conduct is regulated. This vice cannot be cured retrospectively by a ruling of the trial court. Where a court engages in *ad hoc* legislation and, at the same time, seeks to impose punishment for a person for violating this legislation, the defendant has been subjected to the functional equivalent of an *ex post facto* law, in violation of the Due Process Clause. See also, *Douglas v. Bouder*, 93 S.Ct. 2199. This is equally true where a jury engages in *ad hoc* legislation.

II

To Subject an Exhibitor of Motion Picture Films to Criminal Prosecution for Exhibiting an "Obscene" Film Prior to the Time That There Has Been a Judicial Determination of Its Obscenity Is a Denial of Due Process of Law.

"Georgia case law permits a civil injunction of the exhibition of obscene materials," *Paris Adult Theatre I v. Slaton* (93 S.Ct. at 2633), before initiating criminal proceedings. Commenting on this civil procedure, the Court said: "[S]uch a procedure provides an exhibitor

. . . the best notice prior to any criminal indictment, as to whether the materials are unprotected by the First Amendment and subject to state regulation." (93 S.Ct. at 2634).

In *Miller*, Justice Douglas, dissenting, concluded that a prior determination of obscenity was constitutionally required to satisfy the "fair notice" requirement of the Due Process Clause. After commenting on the difficulty the Court has had trying, unsuccessfully, to define obscenity, he asserted that obscenity could not be defined because it deals with subjective matters of taste. "What shocks me may be sustenance for my neighbor. What causes one person to boil in rage over one pamphlet or movie may reflect only his neurosis, not shared by others. . . . Obscenity cases usually generate tremendous emotional outbursts. They have no business being in the courts. . . . Under the present regime—whether old standards or the new ones are used—the criminal law becomes a trap." (93 S.Ct. at 2624). Justice Douglas concluded that

> "until a civil proceeding has placed a tract beyond the pale, no criminal prosecution should be sustained. . . . In any case—certainly when constitutional rights are involved—we should not allow men to go to prison or be fined when they had no 'fair warning' that what they did was criminal conduct." 93 S.Ct. at 2624).

If a specific book has been condemned as obscene in a civil proceeding, and thereafter a person distributes that particular work, then, Justice Douglas stated, "a vague law has been made specific." (93 S. Ct. at 2624). A criminal prosecution brought at that juncture

> "would not violate the time-honored void-for-vagueness test. . . . Obscenity—which even we cannot define with precision—is a hodge-podge. To send men to jail for violating standards they cannot understand, construe and apply is a monstrous thing to do in a Nation dedicated to fair trials and due process" (93 S.Ct. at 2625).

In 1966, Justice Black, dissenting in *Ginzburg v. United States,* 383 U.S.463, also addressed himself to the question of a prior adversary hearing with regard to the obscenity of challenged material, in light of the inherent vagueness of the crime of obscenity.

> "[E]ven if . . . this country is far along the way to a censorship of the subjects about which the people can talk or write, we need not commit further constitutional transgressions by leaving people in the dark as to what literature or what words or what symbols if distributed through the mails make a man a criminal. As bad and obnoxious as I believe governmental censorship is in a Nation that has accepted the First Amendment as its basic ideal for freedom, I am compelled to say that censorship that would stamp certain books and literature as illegal in advance of . . . conviction would in some ways be preferable to the unpredictable book-by-book censorship to which we have now drifted." (383 U.S. at 481).

The same day *Roth* was decided, the Court in *Kingsley Books, Inc. v. Brown,* 354 U.S.436, commented on the due process advantages of a prior civil determination on the question of obscenity before initiating criminal prosecutions. Justice Frankfurter, speaking for the

Court upholding the New York civil procedure for determining obscenity, stated:

> "Instead of requiring the bookseller to dread that the offer for sale of a book may, without prior warning, subject him to a criminal prosecution with the hazard of imprisonment, the civil procedure assures him that such consequences cannot follow unless he ignores a court order specifically directed to him for a prompt and carefully circumscribed determination of the issue of obscenity. Until then, he may keep the book for sale and sell it on his own judgment rather than steer 'nervously among the treacherous shoals.' Warburg, Onward And Upward With The Arts, The New Yorker, April 20, 1957, 98, 101, in connection with R. v. Martin Secker Warburg, Ltd., [1954] 2 All Eng.683 (C.C.C.)." (354 U.S. at 442).

In *Delta Book Distributors, Inc. v. Cronvich*, 304 F. Supp. 662 (E.D. La. 1969), vacated on other grounds *sub nom. Perez v. Ledesma*, 401 U.S.82, a three-judge court also came to the conclusion that a prior adversary hearing was constitutionally required before criminal proceedings were initiated for the violation of a state obscenity statute. The Court observed, in accordance with this Court's prior rulings, that constitutionally protected expression is separated from obscenity "only by a dim and uncertain line" and that any attempt to make it a crime for the circulation of allegedly obscene material "must be closely scrutinized to the end that protected expression is not abridged in the process". (304 F.Supp. at 666). After stating that prior restraint upon the exercise of First Amendment Rights can be exerted through seizure or arrest of the alleged

offender, the court went on to say that since obscenity was not protected by the First Amendment criminal proceedings could be brought, but only if safeguards were taken to minimize the impingement upon the exercise of First Amendment rights. The court concluded that the obscenity statutes might

> "have to incorporate provisions immunizing alleged violators from criminal liability for any activities occurring prior to an adversary judicial determination of the fact of obscenity. Applying these principles . . . the arrests . . . are clearly invalid for lack of a prior adversary determination of the obscenity of the material upon which the arrests . . . were based." (304 F.Supp. at 667).

At least one State—Alabama—has sought by legislation to give an accused fair warning before initiating criminal prosecution for the circulation of "obscenity". See, Ala. Code, Title 14, §§ 374(16j)-(16o) (Supp. 1971). Chapter 64C of the Alabama obscenity statute provides that, prior to the commencement of a prosecution, one of several governmental officials must serve upon an exhibitor "prior written notice that there is reasonable cause to believe that the material" in question is in violation of the obscenity statute. Ala. Code, Title 14, § 374(16m)(a) (Supp. 1971). Then, the person receiving notice has thirty days within which "to file an appropriate action for declaratory judgment to determine the validity of such written notice." Ala. Code, Title 14, § 374(16m)(c) (Supp. 1971). It is true that this statute was declared unconstitutional by a three-judge district court, but only because the Alabama procedure did not conform with the rigorous requirements set forth by this Court where the State engages

in censorship activities. In *United Artists Corp. v. Wright, et al.*, ... F.Supp....., United States District Court for the Middle District of Alabama, Northern Division, Civil No. 4208-N (Jan. 5, 1974),[3] the court stated that while a system of prior restraints is not necessarily invalid such restraints must be hedged about with adequate procedural safeguards. The three-judge court mentioned three such safeguards:

(a) Initially, the court repeated the teachings of this Court that when a system of prior restraints is used by the Government to control speech or press, the burden of proving that the material is unprotected must rest upon the censor. The court concluded that the Alabama statute failed this test, saying:

> "Under the Alabama statute, the burden is clearly upon the individual and not the government; when the statutory warning is given, the state need have only 'reasonable cause' to believe that the material is obscene. Thereafter, if the exhibitor wishes to obtain a definitive ruling from a court, he himself must bring suit and carry the burden of proof. ALA Code, tit. 14, § 374(16m) (c) (Supp. 1971). . . ."

(b) The court also found that the Alabama statute was infirm because it violated the rule of *Freedom v. Maryland*, 380 U.S.51, 58-59, that the procedures of censorship may not constitutionally lend an air of finalty to the action of the censor.

> "Under the procedural system of this [Alabama] statute, the decision of the official giving notice is for all practical purposes a final decision.

[3]The unreported opinion of the court is attached hereto as Appendix A.

> The issuance of the warning effectively stops the showing of the film. The state is not required under the Alabama statute to go to court to obtain an injunction after adjudication. The warning is for all intents and purposes a 'final' act of censorship and, therefore, invalid."

(c) Finally, the court concluded that the Alabama statute was unconstitutional because it failed to provide for a prompt final judicial decision.

> "Nowhere in the Alabama statute is there a provision for expedited judicial consideration, ei- provision for expedited judicial consideration, either at trial or on appeal, of the issue of obscenity. authoritative judicial decision of the State of Alabama providing for expedited consideration of civil adjudications of obscenity *vel non* under this statute. Such an adjudication is, therefore, liable to all of the delays which are incident to the bringing of an ordinary civil action. This failing renders the Alabama statute invalid in that respect."

Amicus would add a fourth safeguard to the three mentioned by the court in *United Artists Corp. v. Wright. Amicus* believes that an exhibitor should have the right to have the film he exhibits judged by a jury. This is a view which Justice Brennan has always held. Dissenting in *Kingsley Books, Inc. v. Brown,* 354 U.S. 436, Justice Brennan, speaking of the New York obscenity statute there involved, stated:

> "I believe the absence in this . . . obscenity statute of a right to jury trial is a fatal defect. * * * The jury represents a cross-section of the community and has a special aptitude for reflecting the view of the average person. Jury trial of ob-

scenity therefore provides a peculiarly competent application of the standard for judging obscenity which, by its definition, calls for an appraisal of material according to the average person's application of contemporary community standards. A statute which does not afford the defendant, of right, a jury determination of obscenity falls short, in my view, of giving proper effect to the standard fashioned as the necessary safeguard demanded by the freedoms of speech and press for material which is not obscene. . . ." (354 U.S. at 447-448).

In *Times Film Corp. v. City of Chicago*, 365 U.S.43, 68-69, Chief Justice Warren, dissenting, said of the censorship statute there involved: "The inexistence of a jury to determine contemporary standards is a vital flaw." Mr. Justice Stewart, while a judge of the Court of Appeals, stated in *Volanski v. United States*, 246 F.2d 842, 845 (6 Cir. 1957), that the question of obscenity "is peculiarly one best left for *nisi prius* determination, preferably by a jury." In *Miller*, this Court also emphasized the special importance of a jury in obscenity cases.

History, it is respectfully submitted, demonstrates the need to have a jury pass upon a film which is charged with being obscene, and not fit to be seen by consenting adults. In England, freedom of speech and press was linked, among other things, with the issue of the right of juries to determine whether particular publications should be suppressed. Fox's Libel Act of 1792 while in terms procedural, transferring from the judge to the jury the power of saying whether any specific writing was a seditious libel, in actuality "placed the decision

in the hands of twelve men whose views were more likely to be representative of general opinion than would be judges and lawyers who perforce had studied the sweeping assertions of the older law cases—which were often relics of Stuart and Star Chamber days." Taswell-Langmead, *English Constitutional History* (11th ed., 1960) 667.

The trials of Wilkes and the printers of the "North Briton"; the prosecution of Wilkes for his "Essay on Woman", found to be an "obscene and impious libel"; the trial of Junius for his celebrated letter to the King; the trial of Thomas Paine *in absentia*, with his historic defense by Erskine; the trial of John Horne for libelling the King's troops in America by calling them murderers; the trials of the Dean of St. Asaph and of Stockdale for the publication of "seditious" pamphlets—all of these cases were monstrous examples of how liberty of the press can be subverted when the jury is deprived of its power to decide. "Trial by jury was the sole security for freedom of the press; and it was found to have no place in the law of England." 2 May, *Constitutional History of England* (Holland ed., 1912) 11.

The change in the law of England at the close of the eighteenth century, as exemplified by Fox's Libel Act, was made necessary by the insistent demand of the people for the right of juries to render general verdicts in all libel cases.

> "It was realized that, if the functions of the jury in a prosecution for libel were enlarged, . . .; if, in other words, they had the right to give a general verdict upon the whole matter; there would be abundant security that the law would be so administered that it harmonized with the political

ideas and the public opinion of the day." X Holdsworth, *History of English Law* (Lond., 1938) 673.

In the debates in the Commons prior to the passage of the Libel Act, it became clear that the real issue was whether the juries or the judges were the best tribunal to decide the question of libel or no libel. Stated one member of the House:

> ". . . it depends solely on the opinion which is entertained of the libel by the public. . . . What passed in the Roman Senate for polite raillery, would in this House be deemed a gross affront, and be perhaps attended with bloodshed. . . . So changeable is the nature of a libel, so much does it assume the chameleon, and suit its colour to the complexion of the times! In short its libellous quality is founded entirely on popular opinions. There is no other standard by which it can be measured or ascertained. Who then, so proper as the people to determine the point?"
>
> Quoted in X Holdsworth, *supra*, at 689.

When the Libel Act was passed, Lord Macauley praised "the inestimable law, which places the liberty of the press under the protection of juries." 2 May, *Constitutional History of England* (Holland ed., 1912) 18, fn. 3. Moreover, Thomas Erkskine's fame was premised upon his courageous defense in the eighteenth century of "the liberty of the press and the rights of juries". 2 May, *supra*, at 16. Almost one hundred years later, a noted English lawyer was to say: "Take, for instance the freedom of the press. This, which we justly prize as one of the first of social blessings, is

chiefly indebted to the jury for its vigorous existence". Forsyth, *History of Trial by Jury* (2d ed., 1878) 364.

Early American history also sheds light on the issue here involved. "The close relations between the Zenger trial and the prosecutions under George III in England and America is shown by the quotations on reprints of the trial and the dedication of the 1784 London edition to Erskine, as well as by reference to Zenger in the discussions preceding the First Amendment." Chafee, *Freedom of Speech* (1920) 23. From the viewpoint of the liberal colonists in America in the early 1700's, "freedom of the press involved both absence of previous restraint and the right to a jury trial". I Government and Mass Communications (1947) 71. Professor Chafee was thus led to observe ". . . a jury trial for restrictions on the sale of books is probably required by both sound policy and the constitutional guaranty of freedom of the press." *Free Speech in the United States* (1941) 539. Support for this view comes also from a noted student of American constitutional history. "Those who framed the First Amendment placed great emphasis upon the value of a jury of citizens in checking government efforts to limit freedom of expression." Emerson, *The Doctrine of Prior Restraint* in 20 L. and Cont. Prob. 648, 657 (1955).

It should be recalled that many issues of the New York Weekly Journal published by Zenger were first "burnt by the hands of the common hangman" before Zenger was indicted for publishing "false, scandalous, malicious and seditious" publications. *The Trial of John Peter Zenger (1734) and The Freedom of the Press*, prepared by the Works Projects Administration (1940) iii. See also, 17 Howell's State Trials 675 (Lond. 1813). In his argument to the jury, Andrew

Hamilton pointed out that one of the reasons for the abolition of the court of Star Chamber was that "the people of England saw clearly the danger of trusting their liberties and properties to be tried, even by the greatest men in the Kingdom, without the judgment of a jury of their equals" *id.*, at 47. Hamilton urged that "jurymen are to see with their own eyes, to hear with their own ears, and to make use of their own consciences and understandings, in judging of the lives, liberties or estates of their fellow-subjects" *id.*, at 49. And on the occasion when Mr. Hamilton was presented with the Freedom of New York after the acquittal of Zenger, the scroll presented to him by the common-council extolled "his learned and generous defense of the rights of mankind, and the liberty of mankind, and the liberty of the press" *id.*, at 58.

When, in 1789, James Madison rose to address the first House of Representatives, he urged upon the House certain proposed amendments to the Constitution which would "expressly declare the great rights of mankind secured under this Constitution". 1 Annals of Congress (1834) 432. Madison stated that the great mass of the people who opposed the Government created by the Constitution "disliked it because it did not contain effectual provisions against the encroachments on particular rights, and those safeguards which they have been long accustomed to have interposed between them and the magistrate who exercises the sovereign power" (*id.*, at 433). Thus, Madison proposed the following amendment, among others: "The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable" *id.*, at 434.

Madison pointed out that the policy of Great Britain in establishing a declaration of rights was not applicable to America. In England, a barrier had been raised against the power of the Crown, but the power of the Parliament "is left altogether indefinite" *id.*, at 436. Even Magna Charta, Madison observed, contained no provision for the "great rights, the trial by jury, freedom of the press, or liberty of conscience" *id.*, at 436. In the United States, stated Madison, the case was different. Barriers against power "in all forms and departments of Government" had been raised *id.*, at 436.

Madison affirmed "Trial by jury cannot be considered as a natural right, but a right resulting from a social compact, which regulates the action of the community, but is as essential to secure the liberty of the people as any one of the pre-existent rights of nature" *id.*, at 437. He warned that "the State Governments are as liable to attack these valuable privileges as the General Government is, and therefore ought to be as cautiously guarded against" *id.*, at 441.

Thus, the confluence of English and American history bear witness to the essential interrelationship between trial by jury and freedom of the press. The First Amendment was intended to prevent not merely the censorship of the press, but "any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens." *Grosjean v. American Press Co.*, 297 U.S.233, 249-250.

Amicus, in urging that a jury trial is constitutionally mandated in obscenity proceedings, is not to be under-

stood as conceding that any film should be at the mercy of a vote of the "common consensus of the community". *Amicus* believes that one's right to freedoms of speech and press should "not be submitted to vote; they [should] depend on the outcome of no elections". *West Virginia State Bd. of Education v. Barnett*, 319 U.S.624, 638-639. So long, however, as the exhibition of films dealing with sex depends upon current community notions of what is acceptable, it is submitted that jury trial and jury determination are integral to such standards.[4]

To paraphrase what Justice Black said, dissenting in *Ginzburg v. United States*, 383 U.S.463, 481, as bad and obnoxious as *amicus* believes government censorship to be in a Nation that has accepted the First Amendment as its basic ideal for freedom, *amicus* is compelled to say that censorship that would stamp certain films as illegal in advance of exhibition or conviction would be preferable to the unpredictable film-by-film censorship which now exists, and pursuant to which law-abiding citizens are sent to jail without fair notice or concrete guidelines as to what is obscene. Additionally, *amicus* believes that censorship, with the

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[4] *Amicus* recognizes that "a particular jury may voice the 'moral sentiments' of a generation ago, not of the present" (*United States v. Roth*, 237 F.2d 796, 822 [2 Cir. 1956], Judge Frank dissenting). *Amicus* also recognizes the fact that "no statistician would conceivably accept the view of a jury—twelve persons chosen at random—as a fair standard on community attitudes on such a subject of obscenity." (*Id.*) *Amicus* is also painfully aware of the warning sounded in *United States v. Klaw*, 150 F.2d 155 (2 Cir. 1955), against the dangers of leaving final authority in jurors to determine what is obscene. *Amicus* agrees with the statement in *Klaw* that unless the jury is tightly controlled and supervised, "a witch hunt might well come to pass which would make the Salem tragedy fade into obscurity." (350 F.2d at 170).

protection of a lay jury, is not as bad and obnoxious as censorship by a judge sitting alone.

If, then, we are to embark upon a form of censorship of what willing adults may view, let there at least be the "fair warning" of a prior judicial decree of what is to be censored. A film exhibitor should not be forced to be both a censor and a defendant in a criminal case.

III

The Constitutional Status of Allegedly Obscene Expression Requires, as a Minimum, Determination on the Basis of Both the Area of the State and the Geographic Area From Which the Jury Is Drawn.

In *Miller*, this Court rejected a "national" standard of First Amendment protection as a limit upon state obscenity prosecutions. It was held that the Court could not be reasonably expected to articulate a single formulation "for all 50 States" (93 S.Ct. at 2618). Thus, in *Miller*, a requirement that the jury evaluate the materials with reference to "contemporary standards of the State of California" was held constitutionally adequate (93 S.Ct. at 2620). It was stated: "It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City." (93 S.Ct. at 2619).

Moreover, in *Miller* this Court emphasized the inherent dangers of undertaking to regulate any form of expression, stating that "State statutes" designed to regulate obscene materials must be carefully limited. It was stressed that conduct must be specifically defined by the "applicable state law, as written or authoritatively construed". Examples of "state laws" directed at de-

piction of defined physical conduct were given in the opinion. The Court held that other "state formulations" could be equally valid in this respect, and that other existing "state statutes, as construed heretofore or hereafter," may be adequate (93 S.Ct. at 2614-2615, n.6).

Amicus submits that the governing rule should be, first, that if expression does not substantially exceed the standards of the State, then such expression is plainly entitled to constitutional protection. However, consistent with the requirements of the First Amendment and the premises of the discussion in *Miller*, a local community should not be deprived of any expression which does not offend the standards of the local community and is accepted and tolerated by the particular locality. In short, material should not be suppressed as obscene unless such material not only offends state standards, but also the standards of the geographic area from which a particular jury is drawn.

The discussion which follows is therefore divided into two sections: the first, that the standards for judging obscenity must be measured by a state standard,[5] as opposed to a "local community" standard; and the second, that even if state standards are exceeded, it should still be open to the accused in an obscenity prosecution to show a broader toleration by the local community.

A. With respect to the initial requirement that a state standard be the governing standard, the following considerations should be noted.

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[5]In this case, by the standards of the State of Georgia. This appears to be the view of the Supreme Court of Georgia in *Slaton, et al. v. Paris Adult Theatre I, et al.*, unreported, No. 26631, de-

(This footnote is continued on next page)

According to the 1970 Census, there are approximately 3,071 counties in the nation. World Almanac, 1973, published by Newspaper Enterprises Association, pp. 189-206. There are approximately 7,200 incorporated cities, villages, boroughs and towns with a population of 2,500 or more in the country. World Almanac, 1973, pp. 152-188. This figure is exclusive of rural areas and unincorporated places. Another breakdown by the 1970 United States Census indicates that there are 8,863 incorporated places with a population of 1,000 or more; 9,803 places with a population of less than 1,000; and 2,102 unincorporated places with a population of 1,000 or more. There are 153 cities with a population of over 100,000. World Almanac, 1973, pp. 136-137. There are 264 large metropolitan areas which contain a central city of 50,000 or more inhabitants, together with such adjacent counties as are functionally integrated with the central city. World Almanac, 1973, pp. 142-143; 405 Annals of the Academy of Political and Social Science, "Urban Change and the Planning Syndrome", 9 (Jan. 1973).

The Director of the Bureau of the Census, Social and Economic Statistics Administration, United States Department of Commerce, states:

> "Americans live in 20,768 recognized places across the country, of which 18,666 are incorporated—6,790 cities, 6,116 towns, 4,531 villages, and 1,229 boroughs. Illinois has the largest number of incorporated places with 1,263; Rhode Island the least with eight.
>
> "The census shows that 9.2% of the population lives in cities of 1,000,000 or more; 6.4% in

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cided October 30, 1973, a ruling seemingly contradictory to the conclusion reached by the same Court in the case herein.

places of 500,000 to 1,000,000; 12.2% in places of 100,000 to 500,000; 17% in places of $25,000 to 100,000; and 20.9% in places of 2,500 to 25,000. Another 7.8% lives in areas classified as urban because of their proximity to large places or their population density. The rural population includes the 5.2% of the total population who live in places of less than 2,500, and 21.3% who live in open country." World Almanac, 1973, p. 132.[6]

If each of the thousands of local subdivisions in the country were permitted to infringe on constitutional freedoms by their own subjective standards, the fundamental postulates of a self-governing society as guaranteed by the provisions of the First and Fourteenth Amendments would be plainly undermined. If the survival of the nation depends upon an enlightened and informed citizenry, it is plain that the judgment of acceptability and tolerance of expression cannot be made dependent upon the subjective predilections of local bodies of the counties, cities, villages and townships throughout the country. The variant operations of police officers, prosecuting officials, censorship bodies, and private censorial groups demonstrate that the adoption of a "Balkanized" standard for judging alleged obscene expression would only result in the censorship of literature and the arts for the entire State by dictates of local communities.

This Court has stated that it is "vital that the standards of judging obscenity safeguard the protection of freedom of speech and press for material which does

[6]It should also be noted that there are 159 counties in the State of Georgia, alone. World Almanac, 1973, pp. 191-192.

not treat sex in a manner appealing to prurient interest". *Roth v. United States*, 354 U.S.478, 488. In *Heller v. New York*, 93 S.Ct.2789, and *Roaden v. Kentucky*, 93 S.Ct.2796, this Court repeatedly referred to books, films or other materials "presumptively protected under the First Amendment". Since it is only "obscenity" that is excluded from the constitutional protection, the question of whether a particular work is obscene necessarily implicates, therefore, a First Amendment question.

The issue here is not one affecting only an isolated group of citizens in the State, but is one involving the concerns of people, generally,—the right to freedom of expression and the right of the people to know—and it is essential that a statewide standard be used in judging whether or not particular expression is entitled to constitutional protection. Where the subject under consideration is the First Amendment guarantees, uniform treatment throughout the State is required. Much confusion and uncertainty would result if each of hundreds of localities were to enforce different standards with respect to the right to exercise freedom of expression. Such a "watered-down version of constitutional rights" by a multiplicity of divergent regulations by municipalities would entail the most harmful consequences to constitutional guarantees. *Garrity v. New Jersey*, 385 U.S.493, 500. "There are village tyrants as well as village Hampdens." *West Virginia State Board of Education v. Barnett*, 319 U.S.624, 638. Publishers and producers of films and other media of communication cannot be expected to create prints of films to satisfy police officers, prosecuting officials, censorship boards, and private censorial groups in the 159 counties of the State of Georgia, to give only one exam-

ple. Each "local community" under such circumstances would censor literature and the arts for the entire State.

Any restriction on the right of citizens to freely express themselves, and the right of the public to know, must have at the very least a state justification; it cannot depend for its validity upon the capriciousness or whim of a "local community".

B. *Amicus* does, however, urge the Court to recognize the additional requirement that material should not be suppressed as obscene unless such material not only offends state standards, but also the standards of the geographic area from which a particular jury is drawn. A requirement that the applicable standards in determining the alleged obscenity of expression be the area from which the jury is drawn has already been enunciated by one court. *Richards v. State*, 497 S.W.2d 770, 777 (Texas. Ct. Civ. App., July 2, 1973). As heretofore stated, Chief Justice Burger, in *Miller*, recognized that public depiction of conduct might be "found tolerable in Las Vegas, or New York City" (93 S.Ct. at 2619).

In the naturalization field, where questions of free speech and press are not even involved, the courts accept the view that "in order to determine whether a petitioner has met his burden of establishing that he is a person of good moral character . . . we should see if the petitioner's character coincides with the generally accepted mores or standards of the average citizen of the community in which the petitioner resides . . . If the petitioner's conduct fails to satisfy the community test, then we should see whether the 'common conscience', when it is possible of being ascertained, of the community as a whole also looks disfavorably upon

such conduct". *In re Mayalls Naturalization*, 154 F. Supp. 556, 560 (E.D. Pa. 1957) (opinion by Chief Judge Ganey); see also, *In re Naturalization of Spak*, 164 F.Supp. 257, 259-260 (E.D. Pa. 1958).

Two important considerations coalesce here, *amicus* submits, to support the conclusion that the constitutional status of allegedly obscene expression should be determined on the basis of both state standards and the standards of the geographic area from which the jury is drawn. In the first place, the decisions rendered by this Court on June 21, 1973, placed heavy reliance upon "the jury system" (*Miller v. California*, 93 S. Ct. at 2616). The Court has relieved the prosecution from the introduction of any expert witnesses (*Kaplan v. California*, 93 S.Ct. at 2685), and while permitting the defense the opportunity to introduce expert evidence, has decried the use of expert testimony in all obscenity prosecutions upon the ground that "no such assistance is needed by jurors" (*Paris Adult Theatre I v. Slaton*, 93 S.Ct. at 2634, n. 6). In short, this Court has in effect made the jury in an obscenity prosecution a small "*ad hoc* legislature" and has left it to the jury, as representatives of the area from which the jury is drawn, to enact whether or not a particular expression is entitled to constitutional protection.

If, then, a jury drawn from a particular geographic area, and assumedly representative of the members of the community in that area, are of the view that particular material does not offend the standards of the community, in the light of First Amendment guarantees it is submitted that the community should have its way and be permitted to view and see and hear what the community has deemed tolerable. This Court has

stated, with respect to a case involving First Amendment guarantees:

> "The case confronts us again with the duty our system places on this Court to say where the individual's freedom ends and the State's power begins. Choice on that border, now as always delicate, is perhaps more so where the usual presumption supporting legislation is balanced by the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment. Cf. Schneider v. State of New Jersey, 308 U.S.147, 60 S.Ct.146, 84 L.Ed.155; Cantwell v. Connecticut, 310 U.S.296, 60 S.Ct. 900, 84 L.Ed.1213, 128 A.L.R.1352; Prince v. Massachusetts, 321 U.S.158, 64 S.Ct.438. That priority gives these liberties a sanctity and a sanction not permitting dubious intrusions. And it is the character of the right, not of the limitation, which determines what standards governs the choice." *Thomas v. Collins*, 323 U.S.516, 529-530.

Since "obscenity" is a limitation on the right of the public to access to constitutionally protected material, it is the character of the right, and not the limitation, which determines application of a constitutional standard. In short, we are committed to the broadest application of First Amendment guarantees and the narrowest limitations upon the exercise of the freedoms protected by the Amendment.

If the aim of self-government, based upon the broadest exercise of freedoms of speech and press, is to be achieved, the diversity among communities should be reconciled with the demands of the First Amendment. The rule, it is submitted, should be that if expression

does not substantially exceed state standards, then such expression is plainly entitled to constitutional protection. However, local communities may permit a broader area of freedom of expression than even that which the First Amendment assumedly protects. The standard suggested by *amicus* will protect expression from the vagaries of local censorship and political opportunism, while at the same time assuring the First Amendment guarantees to the entire State as well as to particular communities in the State.

IV

The Court Should Clarify the Scope of the Area of Ideas Protected by the First Amendment. The Right of Individuals to Express, and the Right of the Public to Receive, Informational, Educational or Entertaining Ideas May Not Be Constitutionally Abridged.

A. While placing "obscenity" outside the pale of constitutional protection, the majority opinion in *Miller* stressed the importance of protecting all ideas—"good or bad, sound or unsound" (93 S.Ct. at 2621). The *Miller* opinion opined that the "stern 19th century American censorship" did not limit or affect "expression of serious literary, artistic, political, or scientific ideas". It was stated that courts would be able to "distinguish commerce in ideas, protected by the First Amendment, from commercial exploitation of obscene material" (93 S.Ct. at 2607). Pointing to the language in *Roth*, the opinion quoted: "The protection given speech and press was fashioned to assure unfettered interchange of *ideas* for the bringing about of political and social changes desired by the people." (93 S.Ct. at 2620-2621) (Court's emphasis).

Amicus respectfully submits that the Court should make clear that the phrase "literary, artistic, political or scientific" was not intended to delineate strict categories of ideas which alone are protected by the provisions of the First Amendment. Such hardening of the categories would run counter not only to history and the basic postulates of our democratic society, but also to the plain provisions of the First Amendment and a host of interpretive decisions of the Amendment by this Court.[7] Whatever limits there may be on the minds of men, it is submitted that they cannot include the multifold and multifarious *ideas* which the intellect and imagination engender. The opinion of Mr. Justice Harlan in *Cohen v. California,* 403 U.S.15, deserves careful consideration on this issue:

> ". . . The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests . . . We cannot lose sight of the fact that, in what otherwise might seem a trifling and annoying instance of individual distasteful abuse of a privilege, these fundamental societal values are truly implicated. That is why '[w]holly

[7]Apart from the issue of separation of church and State, and freedom of conscience, it can hardly be contended that the expression of religious ideas is unprotected.

neutral futilities * * * come under the protection of free speech as fully as do Keats' poems or Donne's sermons,' Winters v. New York, 333 U.S.507, 528, 68 S.Ct.665, 676, 92 L.Ed.840 (1948) (Frankfurter, J., dissenting), and why 'so long as the means are peaceful, the communication need not meet standards of acceptability.' . . .

"Additionally, we cannot overlook the fact, because it is well illustrated by the episode involved here, that much linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech has little or no regard for that emotive function which practically speaking, may often be the more important element of the overall message sought to be communicated. Indeed, as Mr. Justice Frankfurter has said, '[o]ne of the prerogatives of American citizenship is the right to criticize public men and measures—and that means not only informed and responsible criticism but the freedom to speak foolishly and without moderation.'" (403 U.S. at 24-26).

B. The reason that the Constitution gives broad protection to the dissemination of ideas has been variously stated. Justice Cardozo said in *Palko v. Connecticut*, 302 U.S.319, 327: "Of that freedom [of thought and speech] one may say that it is the matrix, the indispensable condition, of nearly every other form of freedom

. . ." In *Thomas v. Collins,* 323 U.S.516, 529, Justice Rutledge wrote of "the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment". Even such a critic of the "preferred position" as Justice Frankfurter acknowledged that First Amendment guarantees "come to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements". *Kovacs v. Cooper,* 336 U.S.77, 95.

The premises upon which the aforesaid conclusion rests have been elucidated in four distrinct, but cognate, ways. The first recognizes that freedom of expression is plainly important for the enhancement of human dignity, a means of assuring individual self-fulfillment. "The essential characteristic of these liberties is, that under their shield many types of life, character, opinion and belief can develop unmolested and unobstructed." *Cantwell v. Connecticut,* 310 U.S.296, 310. As Professor Emerson has stated: "Hence suppression of belief, opinion, or other expression is an affront to the dignity of man, a negation of man's essential nature." Emerson, *The System of Freedom of Expression* 6 (1970).

A second ground for justifying the high position afforded freedom of expression in our constitutional system is exemplified in the statement by Justice Holmes in his dissenting opinion in *Abrams v. United States:*

> "But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believed the very foundations of their own conduct that the ultimate good de-

> sired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, . . . That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment." 250 U.S.616, 630.

It is of course important to note, as a corollary to this utilitarian philosophy, that the "market place" is not a place where goods are being marketed. Ideas cannot be graded for their quality and quantity. "For the Constitution protects expression and association without regard to the race, creed, or political or religious affiliation of the members of the group which invokes its shield, or to the truth, popularity, or social utility of the ideas and beliefs which are offered." *NAACP v. Button*, 371 U.S.415, 444-445.

A third ground in support of "the firstness of the First Amendment" is the importance of an unfettered opportunity for free expression in a self-governing society. If a democratic society is to survive, it requires intelligent discussion by members of the community. Without freedom of speech and thought, decision making by all members of society is rendered impossible. If governments "derive their just powers from the consent of the governed", the governed must have full freedom of expression, both in forming individual judgments and in forming the common judgment. The principle embraces "the right to participate in the building of the whole culture", and includes "all areas of human learning and knowledge". Emerson, *Ibid.* 7.

The fourth ground is exemplified by the aforementioned observations of Justice Harlan in *Cohen v. California*. Recognition of the emotive justification for the

preferred position given to First Amendment rights leads to an alleviation of individual and societal anxieties and tensions. If, as Justice Harlan observed, words are often chosen as much for their emotive as their cognitive force, "we cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process". 403 U.S. at 26. See, Comment, *The Preferred Position Re-examined: An Emotive Justification*, 51 Journal of Urban Law 255-284 (1973).

Freedom of expression, therefore, is plainly important for the enhancement of human dignity, a means of assuring individual self-fulfillment. A rational self-fulfillment helps to shape individual judgments. In addition, the First Amendment was adopted to implement and facilitate the people's power to govern themselves. These functions, self-fulfillment and societal participation, are essential structures of the First Amendment. Moreover, "it is the function of speech to free men from the bondage of irrational fears". *Whitney v. California*, 274 U.S.357, 376. Each individual in society must therefore be free to think, reason, know, consider, appreciate and imagine. He must have the unfettered right to decide what he shall say and what he shall write, what he shall read, what he shall see, and what he shall hear. This thinking process involves more than political discussion. It includes all ideas, informational, educational, entertaining, literary, artistic, political, scientific, or any other expression which will help to educate and mold the citizen for participation in the political and cultural life of a democratic society. "Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to

enable the members of society to cope with the exigencies of their period." *Thornhill v. Alabama*, 310 U.S. 88, 102.

C. The importance of ideas which are informational, educational, and entertaining has been recognized by this Court. See, *Winters v. New York*, 333 U.S.507, 510; *Stanley v. Georgia*, 394 U.S.557, 564. Entertainment is a source of pleasure and at the same time a means of educating the public. It can be penetrating, profound and brilliant. Very often in entertainment there may be found a re-examination of old assumptions and the spelling out of new issues for an era of social change. The works of an Aristophanes or a Rabelais are a source of entertainment, but they are also fraught with ideas which instructed the people of their times and continue to do so to the present day. One of the important functions of entertainment is to make conscious and manageable certain unacceptable unconscious forces in our own minds and in our interaction with other members of the community. In the variety, vividness, exaggeration, romanticism and humanity of entertainment, the viewer, reader or listener achieves a deeper perception of his own individuality and the society in which he lives.

With respect to informational ideas, this Court has often stressed their importance. "The State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge." *Griswold v. Connecticut*, 381 U.S.479, 482. In *Wood v. Georgia*, 370 U.S.375, the Court held that a broad conception of the First Amendment's guarantee of freedom of speech and press is necessary to supply the public need for information and education with respect

to the significant issues of the times. It has been stated that the First Amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public". *Citizens Publishing Co. v. United States*, 394 U.S.131, 139-140.

The protection of ideas that are educational has also been the particular concern of the Court. As Justice Frankfurter stated in *Sweezy v. New Hampshire*, 354 U.S.234, 261:

> "Progress in the natural sciences is not remotely confined to findings made in the laboratory. Insights into the mysteries of nature are born of hypothesis and speculation. The more so is this true in the pursuit of understanding in the groping endeavors of what are called the social sciences, the concern of which is man and society. The problems that are the respective preoccupations of anthropology, economics, law, psychology, sociology and related areas of scholarship are merely departmentalized dealing, by way of manageable division of analysis, with interpenetrating aspects of holistic perplexities. For society's good—if understanding be an essential need of society—inquiries into these problems, speculations about them, stimulation in others of reflection upon them, must be left as unfettered as possible. Political power must abstain from intrusion into this activity of freedom, pursued in the interest of wise government and the people's well-being, except for reasons that are exigent and obviously compelling."

The importance, therefore, of emphasizing the protection afforded to informational, educational, or en-

tertaining ideas is manifest. This Court stated in *Red Lion Broadcasting Co. v. FCC*, 395 U.S.367, 390: "It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences." In *Time, Inc. v. Hill*, 385 U.S.374, 388, this Court reiterated that "no suggestion can be found in the Constitution that the freedom there guaranteed for speech and the press bears an inverse ratio to the timeliness and importance of the ideas seeking expression" and, once again, that "the line between the informing and the entertaining is too elusive for the protection of . . . [freedom of the press]". In *United Mine Workers of America v. Illinois State Bar Association*, 389 U.S.217, 223, the Court emphasized again that "the rights of free speech and a free press are not confined to any field of human interest".

D. For all the foregoing reasons, *amicus* respectfully submits that the Court should clarify its ruling in *Miller* to the extent of enunciating the principle that the First Amendment protects works which, taken as a whole, have tangible "literary, artistic, political, scientific, informational, educational, entertaining ideas, or any other ideas of human interest". Such a clarification would make clear to trial and appellate judges that in obscenity prosecutions, as in all other cases which implicate First Amendment questions, the protective guarantees of the First Amendment remain undiminished.

Amicus has substituted the word "tangible" for the word "serious" on the assumption that this Court did not intend to eliminate ideas which are presented in the comic spirit. One of the things we all unconsciously seek in art, particularly in fiction, is the kind of understanding that is shared in laughter. The humorous

attitude can be liberating and elevating. See, *Modern American Humor*, edited by Bennett Cerf (1954); Freud, "Humour", in Vol. I *World of Psychology*, edited by G. B. Levitas 279-284 (1963).

Conclusion.

For the reasons set forth above, the judgment below should be reversed.

Respectfully submitted,

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for Adult Film Association.

SAM ROSENWEIN,
Of Counsel.

APPENDIX A.

In the United States District Court for the Middle District of Alabama, Northern Division.

United Artists Corporation, a Corporation, Plaintiff, v. E. L. Wright, Jr., Individually, and as Chief of Police, City of Montgomery, Alabama, Defendant, James H. Evans, as District Attorney for the Fifteenth Judicial Circuit of the State of Alabama; Robert L. Dorrough and Ardith C. Dorrough, Defendants—Intervenors. Civil Action No. 4208-N.

Filed: Jan. 5, 1974.

Before RIVES, Circuit Judge, and JOHNSON and VARNER, District Judges.

JOHNSON, District Judge:

Plaintiff, United Artists Corporation, brings suit under 42 U.S.C. § 1983 and 28 U.S.C. § 2201, seeking to have Chapter 64C of the Alabama obscenity statute, ALA. CODE tit. 14, §§ 374(16j)-(16o)(Supp. 1971), declared unconstitutional on its face and as applied. The constitutionality of a statute of statewide application being brought into question, a three-judge district court was convened pursuant to 28 U.S.C. § 2284. The case is submitted upon the pleadings, affidavits, briefs and depositions filed in this cause.

I. *Facts*

Plaintiff, a film distributor operating nationally, is the owner and distributor of the motion picture "Last Tango in Paris." Defendant E. L. Wright, Jr., is the Chief of Police of the City of Montgomery, Alabama, and is sued in his capacity as such and also individually. Intervening defendant James H. Evans is District

Attorney for the Fifteenth Judicial Circuit of the State of Alabama. Intervening defendants Robert L. and Ardith C. Dorrough are citizens of Montgomery, Alabama.

Plaintiff entered into an agreement with a local movie theater for the exhibition of the film "Last Tango in Paris." On October 11, 1973, without any prior administrative or judicial proceeding before a neutral party, the exhibitor received a written notice from defendant Wright that there was reasonable cause to believe that the exhibition of that film would constitute a violation of the Alabama laws regulating obscenity. The written notice pointed out that the exhibitor could seek a declaratory judgment in the proper state circuit court on the obscenity *vel non* of the film. Defendant Wright, in his written notice, informed the exhibitor that "the exhibition of this movie prior to obtaining the declaratory judgment might result in prosecution." The exhibitor then declined to show "Last Tango in Paris" in his theater. Thereafter plaintiff brought this action, in which he alleges the unconstitutionality of ALA. CODE tit. 14, §§ 374(16j)-(16o) (Supp. 1971) on its face and as applied.

II. *Standing*

Defendants contend that plaintiff lacks standing to prosecute this action because it has not been harassed, arrested, indicted or prosecuted in connection with the subject matter of this action. Plaintiff, however, is in privity of contract with its local exhibitor. Plaintiff's exhibitor has received an explicit threat or warning that, if it proceeds to show the film in question here, prosecution might well ensue. The exhibitor, on account of the threat of prosecution, declines to exhibit the

film. Plaintiff alleges that as a direct and proximate result of this written threat, pursuant to the statute alleged to be unconstitutional, it stands to lose approximately $20,000 in anticipated revenues. Whatever value might be put upon First Amendment rights in this case, it is clear that plaintiff alleges *financial* injury in fact sufficient to confer standing. The alleged financial injury is proximately caused by the action of defendant Wright acting pursuant to the challenged statute. In such cases as this, it is necessary that distributors as well as exhibitors have standing. *Interstate Circuit, Inc., v. Dallas,* 390 U.S. 676, 691 n.22 (1968).

Furthermore, the threat of arrest in this case is not "imaginary and speculative." *Younger v. Harris,* 401 U.S. 37, 42 (1971). The existence of a genuine threat of arrest suffices to confer standing. While it is true that defenses premised upon the First Amendment could be raised in a criminal prosecution resulting from an exhibition of "Last Tango in Paris," there is no requirement that citizens must "await and undergo a criminal prosecution as the sole means of seeking relief." *Doe v. Bolton,* 410 U.S. 179, 188 (1973). *Accord, Wulp v. Corcoran,* 454 F.2d 826, 830 (1st Cir. 1972); *Thoms v. Smith,* 334 F. Supp. 1203, 1207 (D. Conn. 1971) (3-judge court), *aff'd sub nom. Thoms v. Heffernan,* 473 F.2d 478 (2d Cir. 1973); *Anderson v. Vaughn,* 327 F. Supp. 101, 103 (D. Conn. 1971) (3-judge court). Plaintiff clearly has standing in this cause, and its claim is otherwise justiciable.

III. *Comity—The Younger Doctrine*

Defendants contend that this Court is precluded by the policy of comity from deciding this case on the merits. Certainly if there were a pending state criminal

prosecution against plaintiff, this Court would possibly be precluded from reaching the merits. *Younger v. Harris,* 401 U.S. 37, 54 (1971); *Samuels v. Mackell,* 401 U.S. 66, 72-73 (1971); *Perez v. Ledesma,* 401 U.S. 82, 83 (1971). A similar result could obtain if there were a pending civil process which leads to, or is a part of, a criminal prosecution. *Palaio v. McAuliffe,* 466 F.2d 1230, 1231-32 (5th Cir. 1972).

In this case, the letter from defendant cannot be said to constitute a pending criminal prosecution; nor can it be characterized as a pending civil process which leads to, or is a part of, a criminal prosecution. The notice letter here involved is, quite simply, a threat of prosecution. When a state criminal prosecution is only threatened, and not pending, many cases hold that the *Younger* doctrine does not bar a consideration on the merits of a cause. Courts recognized two reasons for so holding. First is the language in *Younger* noting that

> [t]here may, of course, be extraordinary circumstances in which the necessary irreparable injury can be shown even in the absence of the usual prerequisites of bad faith and harassment.

Younger v. Harris, 401 U.S. 37, 53 (1971). Applying this language, some courts have held that the absence of a pending prosecution, the imminence of a threatened prosecution, and a First Amendment challenge combine to form "extraordinary circumstances" within the meaning of *Younger. Wulp v. Corcoran,* 454 F.2d 826, 831 n.6 (1st Cir. 1972); *Anderson v. Vaughn,* 327 F. Supp. 101, 103 (D. Conn. 1971) (3-judge court).

Second, some courts have applied in cases like this what is termed a "pending/threatened" distinction, in holding that the *Younger* doctrine is inapplicable to situations in which a state prosecution is merely threatened. *Thoms v. Heffernan,* 473 F.2d 478, 483 (2d Cir. 1973); *Lewis v. Kugler,* 446 F.2d 1343, 1347 (3rd Cir. 1971); *Hull v. Petrillo,* 439 F.2d 1184, 1186 n.1 (2d Cir. 1971). The United States Court of Appeals for this circuit has adopted a further refinement of the pending/threatened distinction. If a state statute is attacked upon grounds of its unconstitutionality *as applied,* and no prosecution is pending, plaintiff must allege and prove bad faith prosecution or harassment. *Becker v. Thompson,* 459 F.2d 919, 923 (5th Cir. 1972), *cert. granted sub nom. Steffel v. Thompson,* 410 U.S. 953 (1973). *Accord, Milner v. Burson,* 470 F.2d 870, 874 (5th Cir. 1972). However, when a plaintiff attacks the *facial* constitutionality of a state statute, and there is no pending state criminal prosecution, a three-judge court is not foreclosed by *Younger* from a decision on the merits, even absent an allegation of bad faith or harassing official conduct. *Jones v. Wade,* 479 F.2d 1176, 1182 (5th Cir. 1973).

Applying these principles to this case, this Court holds that plaintiff's claim is not barred by the doctrine of comity, since a prosecution is merely threatened and since plaintiff alleges the unconstitutionality of the obscenity statute upon its face. Since it is not necessary for this Court to consider the unconstitutionality of the statute as applied (*i.e.,* the obscenity *vel non* of the movie), we do not need to consider whether there was in this case bad faith or harassing conduct by defendants. And, since we recognize and apply the "pending/threatened" distinction as declared by the

Fifth Circuit, it is not necessary to consider the applicability of the "extraordinary circumstances" exception to *Younger*.

IV. *Abstention*

Defendants also contend that this Court should, by reason of the abstention doctrine, decline to decide this case upon the merits. The doctrine of abstention, first espoused in *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941), is a judge-made doctrine to be used only in very limited circumstances. Congress has endowed the federal judiciary with power to render declaratory judgments. When a plaintiff chooses a federal forum for the adjudication of his case, the federal court is not obliged to dismiss the case merely because plaintiff could have brought his action in a state court. *Kusper v. Pontikes*, ... U.S. .... (1973); *Lake Carriers' Ass'n v. MacMullan*, 406 U.S. 498, 510 (1972). To dismiss this case at this point, and to send plaintiff into state court, would cause a delay which would "itself effect the impermissible chilling of the very constitutional rights [plaintiff] seeks to protect." *Zwickler v. Koota*, 389 U.S. 241, 252 (1967).

The strongest case for abstention exists when there is a possible limiting construction which could be given a state statute by a state court, in order to avoid most or all of the constitutional problem. *Lake Carriers' Ass'n v. MacMullan*, 406 U.S. 498, 510 (1972); *Wulp v. Corcoran*, 454 F.2d 826, 833 (1st Cir. 1972); *Lewis v. Kugler*, 446 F.2d 1343, 1346 (3rd Cir. 1971). In this case, there is no possibility of such a construction. The procedural portions of the statute here under attack contain defects which could not be eliminated by a narrow construction. That being so, there appears

to be no reason for the application of the doctrine of abstention. This Court is mindful of the pendency in the Alabama Supreme Court of several cases in which there are, *inter alia,* challenges to the constitutionality of the Alabama obscenity statutes. However, in those cases defendants were prosecuted criminally. Since criminal prosecutions present issues altogether different from instances of prior restraint, the pendency of the cases in the Alabama Supreme Court does not have sufficient bearing upon this case to warrant abstention. Plaintiff's choice of a federal forum will be honored, and this case will be decided upon its merits.

V. *Procedure under the Alabama Obscenity Statute*

Plaintiff asserts that the statute in question sets up a system of prior restraints upon First Amendment freedoms and that the statute fails to provide the safeguards which are constitutionally required under a system of prior restraint.

Chapter 64C of the Alabama obscenity statute, under attack here, provides that, prior to the commencement of a prosecution, one of several governmental officials must serve upon an exhibitor "prior written notice that there is reasonable cause to believe the material" in question is in violation of the obscenity statute. ALA. CODE tit. 14, § 374(16m)(a)(Supp. 1971). Then, the person receiving notice has 30 days within which "to file an appropriate action for declaratory judgment to determine the validity of such written notice." ALA. CODE tit. 14, § 374(16m)(c)(Supp. 1971).

Central to a decision in this case is the issue of whether or not this statutory "warning" constitutes a

prior restraint. Clearly the warning scheme is not an absolute prohibition against the showing of movies, as an injunction would operate in similar circumstances. However, a statutory scheme need not be published under the rubric "Censorship Statute" before it is considered an effective prior restraint. Courts must not be blind to the effect of a statute. One clear effect of this particular scheme is that the notice operates almost as effectively to bar movie exhibitions as an injunction would operate. Without such a notice exhibitors might well be willing to show movies which are arguably protected by the Constitution. However, when the government goes to the trouble to warn an exhibitor that criminal prosecution might ensue upon exhibition of a movie, few would dare ignore the warning. "People do not lightly disregard public officers' thinly veiled threats to institute criminal proceedings against them if they do not come around . . . ." *Bantam Books, Inc., v. Sullivan*, 372 U.S. 58, 68 (1963). Such a system of threatened prosecution "can constitute an all too effective prior restraint." *Poulos v. Rucker*, 288 F. Supp. 305, 310 (M.D. Ala. 1968). Therefore, this Court holds that Chapter 64C of the Alabama obscenity statute, ALA. CODE tit. 14, §§ 374(16j)-(16o)(Supp. 1971), is in legal effect a system of prior restraints.

But that holding does not end our inquiry. A system of prior restraints is not necessarily invalid. *Times Film Corp. v. Chicago*, 365 U.S. 43 (1961). However, "[a]ny system of prior restraints of expression comes to . . . Court bearing a heavy presumption against its constitutional validity." *Bantam Books, Inc., v. Sullivan*, 372 U.S. 58, 70 (1963). Because of the dangers inherent in the use of prior restraints, courts have established rigorous procedures which must be provided be-

fore a prior restraint may be held valid. These procedural safeguards are three in number.

A. *Burden of Proof.* When a system of prior restraints is used by the government to control speech or the press, the burden of proving that the material is unprotected must rest upon the censor. *Blount v. Rizzi,* 400 U.S. 410, 417-18 (1971); *Freedman v. Maryland,* 380 U.S. 51, 58-59 (1965); *Cinema Classics v. Busch,* 339 F. Supp. 43, 50 (C.D.Cal. 1972)(3-judge court); *Studio III, Inc., v. Smith,* 326 F.Supp. 1166, 1169 (S.D. Iowa 1971); *Embassy Pictures Corp. v. Hudson,* 242 F. Supp. 975, 978 (W.D. Tenn. 1965).

Under the Alabama statute, the burden is clearly upon the individual and not the government; when the statutory warning is given, the state need have only "reasonable cause" to believe that the material is obscene. Thereafter, if the exhibitor wishes to obtain a definitive ruling from a court, he himself must bring suit and carry the burden of proof. ALA. CODE tit. 14, § 374(16m)(c) (Supp. 1971). Since the statute *clearly* provides that the burden of bringing suit is upon the exhibitor, there is no reason to abstain in this case to hope for a narrowing construction from the state courts. Such a construction on this issue would have to disregard the plain language of the statute.

B. *Air of Finality to Censor.* The procedures of censorship may not constitutionally lend an air of finality to the action of the censor.

> To this end, the exhibitor must be assured, by statute or authoritative judicial construction, that the censor will, within a specified brief period, either . . . [allow exhibition] or go to court to restrain showing the film.

Freedman v. Maryland, 380 U.S. 51, 58-59 (1965).

Under the procedural system of this statute, the decision of the official giving notice is for all practical purposes a final decision. The issuance of the warning effectively stops the showing of the film. The state is not required under the Alabama statute to go to court to obtain an injunction after adjudication. The warning is for all intents and purposes a "final" act of censorship and is, therefore, invalid.

C. *Prompt and Final Judicial Determination.* In order to provide a valid prior restraint system, a statutory scheme must provide a prompt final judicial decision. *Teitel Film Corp. v. Cusack*, 390 U.S. 139, 142 (1968); *Grove Press v. City of Philadelphia*, 418 F.2d 82, 90 (3rd Cir. 1969); *Cinema Classics v. Busch*, 339 F. Supp. 43, 50 (C.D. Cal. 1972)(3-judge court); *National Ass'n of Theater Owners v. Motion Picture Comm'n of Milwaukee*, 328 F. Supp. 6, 12 (E.D. Wisc. 1971); *Studio III, Inc., v. Smith*, 326 F. Supp. 1166, 1169 (S.D. Iowa 1971); *Gundlach v. Rauhauser*, 304 F. Supp. 962, 965-66 (M.D. Pa. 1969); *United States v. A Motion Picture Film Entitled "Pattern of Evil,"* 304 F. Supp. 197, 200 (S.D.N.Y. 1965).

Nowhere in the Alabama statute is there a provision for expedited judicial consideration, either at trial or on appeal, of the issue of obscenity. This Court has not been made aware of any authoritative judicial decision of the State of Alabama providing for expedited consideration of civil adjudications of obscenity *vel non* under this statute. Such an adjudication is, therefore, liable

to all of the delays which are incident to the bringing of an ordinary civil action. This failing renders the Alabama statute invalid in that respect.

This Court, therefore, finds that the statutory system under which notice or warning is given pursuant to ALA. CODE tit. 14, §§ 374(16m)(Supp. 1971) is unconstitutional because of its procedural defects.

VI. *Unconstitutionality as Applied*

Since the statute is unconstitutional on its face, there is no necessity of determining whether it is unconstitutional as applied, *i.e.*, whether this particular film is obscene. Furthermore, it appears that the *Younger* doctrine as applied in this circuit might preclude such an inquiry, at least absent bad faith prosecution. *Becker v. Thompson*, 459 F.2d 919, 923 (5th Cir. 1972), *cert. granted sub nom. Steffel v. Thompson*, 410 U.S. 953 (1973).

VII. *Separability*

If the "notice" provisions in Chapter 64C of the Alabama obscenity statute are unconstitutional, as we today declare, this Court must determine whether the remainder of the statute must fall also. Principally this means that we must decide whether exhibitors may still be criminally prosecuted despite the invalidity of the notice provisions of Chapter 64C.

If a statute constitutes one inseparable whole, rather than several distinct and separable parts, a declaration of the unconstitutonality of one part must result in the failure of the entire statutory scheme. This "presents

a question of statutory construction and of legislative intent. . . ." *Carter v. Carter Coal Co.*, 298 U.S. 238, 313 (1936).

There are two indicia in this case by which this Court is obliged to hold that Chapter 64C was intended to constitute one entire, indivisible statute, and not a series of independent parts. First, the legislature provided that no criminal prosecution could be commenced under this statute without first giving the required warning. ALA. CODE tit. 14, § 374(16m)(a)(Supp. 1971). Apparently the legislature viewed the warning and the prosecution as inseparable acts and expressly forbade prosecution in the absence of the required warning.

Second, the statute contains no separability clause.

> In the absence of such a provision, the presumption is that the Legislature intends an act to be effective as an entirety—that is to say, the rule is against mutilation of a statute; and if any provisions be unconstitutional, the presumption is that the remaining provisions fall with it.

Carter v. Carter Coal Co., 298 U.S. 238, 312 (1936). Under Alabama law, the absence of a separability clause means that the statute is to be considered as an indivisible whole. *San Ann Tobacco Co. v. Hamm*, 283 Ala. 397, 406, 217 So.2d 803 (1969).

This Court can only conclude that the Alabama legislature intended Chapter 64C to stand or fall as a whole, both notice provision and criminal provision. Accordingly, the entire statute must fall upon the declaration of unconstitutionality of the notice provision.

This Court, therefore, holds that ALA. CODE tit. 14, §§ 374(16j)-(16o) (Supp. 1971), is in its entirety unconstitutional and void. An injunction will issue against its enforcement.

Done, this the 5th day of January, 1974.

/s/ M. Johnson, Jr.
UNITED STATES DISTRICT JUDGE

/s/ R. E. Varner
UNITED STATES DISTRICT JUDGE

RIVES, Circuit Judge:

I concur in the foregoing opinion of my colleagues and adhere to similar views expressed in my dissenting opinion in *Grove Press, Inc. v. Bailey,* N.D. Ala. 1970, 318 F.Supp. 244 at 257-262, *vacated and remanded,* June 26, 1973, ...U.S. ...., 41 L.W. 3670.

/s/ Richard T. Rives
UNITED STATES CIRCUIT JUDGE

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-557

BILLY JENKINS,

Appellant

v.

STATE OF GEORGIA,

Appellee

ON APPEAL FROM THE SUPREME COURT OF GEORGIA

BRIEF FOR DIRECTORS GUILD OF AMERICA, INC., *Amicus Curiae*

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ON APPEAL FROM THE SUPREME COURT OF GEORGIA

BRIEF FOR DIRECTORS GUILD OF AMERICA, INC.,

Amicus Curiae

This brief is submitted in support of the Appellant's position. Both parties consented to the submission. Their letters of consent will be presented to the Court with the brief.

Statement Of The Case

The Appellant Billy Jenkins was fined $750 and was put on probation for a year for having exhibited the film "Carnal Knowledge" in Dougherty County, Georgia. He was convicted

of "distributing obscene materials", *Jenkins* v. *State,* 230 Ga. 726, 199 S.E. 2d 183, at p. 184. Before the picture was shown in Dougherty County, it was exhibited in the larger cities of the United States and in many cities and towns in Georgia. There were no other proceedings to punish or prevent its exhibition. *Jenkins* v. *State,* 230 Ga. 726, 199 S.E. 2d 183, at p. 186 (dissenting opinion).

Jenkins' conviction was sustained by the Supreme Court of Georgia with three of the seven Justices of that Court dissenting. *Jenkins* v. *State,* 230 Ga. 726, 199 S.E. 2d 183, 185. The majority and dissenting opinions in the Supreme Court of Georgia assume that the jurors in this case judged the film to be obscene in accordance with the standards of their community (Dougherty County). Mr. Justice Jordan, writing for the majority, held it appropriate for juries to "consider State *or* local community standards" *Jenkins* v. *State,* 230 Ga. 726, 199 S.E. 2d at p. 184 (emphasis ours). Mr. Justice Hawes, in his dissent, objected particularly to "the tacit approval of small towns and hamlets as*** the 'community' from which the standard for obscenity is drawn" 230 Ga. 726, 199 S.E. 2d at p. 189.

The Interest of the Amicus Curiae

Directors Guild of America, Inc. represents directors of motion picture films, television productions and radio programs throughout the United States and in most other countries where moving pictures are made. The Guild's principal aims are to protect the creative rights and economic interests of directors. Its principal offices are in Hollywood, New York and Chicago.

The Guild files this brief in support of the Appellant's position, for if the judgment of the Supreme Court of Georgia in this case is sustained, it will not be possible for directors to produce material relating to sex, for general distribution, unless the work satisfies the demands of the most repressive communities in the States.

The Courts below failed to distinguish between thoughtful comment on sexual attitudes in a film made with consummate skill, and the exploitation of mindless obscenity. The Guild supports the Appellant's request for a reversal of his conviction, for if the Judgment is reversed, the error of the Georgia courts may be less likely to recur.

POINT I

The Courts Below Violated the Constitutional Guarantee of Free Speech and Press in Punishing the Appellant for Showing the Film "Carnal Knowledge".

The suppression or punishment of a communication that is *not* obscene is, of course, a violation of the constitutional guarantee of freedom of speech or press, *Miller* v. *California*, 413 U.S. 15. In *Miller* the Court, to remove uncertainty in determining whether material is in fact obscene, "agreed on concrete guidelines to isolate 'hard-core' pornography from expression protected by the First Amendment" (413 U.S. at p. 29). One of the tests for identifying obscene material that the Court adopted in *Miller* is, "whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value" (413 U.S. at p. 24). See also *Jacobellis* v. *Ohio*, 378 U.S. 184 at p. 191. If a work does have serious literary, artistic, political or scientific value, the Court indicated that it merits First Amendment protection despite a "prurient, patently offensive depiction or description of sexual conduct" *Miller* v. *California*, 413 U.S. at p. 26.

The Court acknowledged in *Miller* that the application of its guidelines in specific cases "may not be an easy road, free from difficulty" (413 U.S. at p. 29). It suggested that if the constitutional standards are not properly applied in the first instance, appellate supervision will be adequate to protect First Amendment values (413 U.S. at p. 25). Quoting the opinion in

Roth v. *United States*, 354 U.S. 476, at p. 498, the Court said, "Our duty admits of no 'substitute for facing up to the tough individual problems of constitutional judgment involved in every obscenity case' " (*Miller* v. *California*, 413 U.S. at pp. 29, 30).

The problems of constitutional judgment in this case are not at all tough or difficult. As Mr. Justice Gunter wrote in his dissent in the Supreme Court of Georgia, "it is inconceivable to me that this work can be relegated to that area of verbal, written, and performing expression which falls outside of the protection of the First Amendment * * * " *Jenkins* v. *State*, 230 Ga. 176, 199 S.E. 2d at p. 185. The film "Carnal Knowledge" is not, and it is not claimed that it is, "hard-core" pornography. The film does not portray "hard core sexual conduct for its own sake"[1] (*Miller* v. *California*, 413 U.S. at p. 35). There are a few brief scenes in the film that suggest sexual conduct but it is clear that they were not inserted to arouse prurient interest. The scenes are relevant and indeed essential to the central theme of the film.[2] The present members of the Court wrote in *Kois* v. *Wisconsin*, 408 U.S. 229 at p. 231, "A reviewing court must of necessity look at the context of the material * * * * "

The inquiry that Courts are called upon to make with respect to the serious artistic value of challenged material, does not, apparently, require any knowledge of the medium of expression, and the Courts are not expected to make informed critical judgments. The Court may pass upon the serious artistic value of the communication, without benefit of expert guidance or any evidence other than the questioned work. (*Paris Adult Theater I* v. *Slaton*, 413 U.S. 49; *Kaplan* v. *California*, 413 U.S.

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[1] It seems clear from the opinion of the majority in *Miller* v. *California* that only hard-core pornography may be condemned as obscene.

[2] The film is about the unchanging, adolescent sexual attitudes of two young men who, as the critic of *Newsweek* wrote, "travel through time without changing, who live out destinies that are already drawn by the lines of their limited selves."

115.) In this case the State merely showed the film to the jury and then rested.

To pass judgment on the artistic quality of a film director's work, one should be able to perceive the manner in which, and the extent to which, the director realized the author's intention and style; one should also have knowledge or appreciation of acting techniques, and know the background of the actors with whom the director worked,[3] and be aware of the director's sense of timing and composition (the arrangement of figures, objects and space within the frame); and one should understand the director's uses of ambiguity, symbol, color,[4] lighting, voice, camera position,[5] camera movement, camera lenses and filters, music, scenery, costume, editing techniques, etc., etc. We hope it is not disrespectful to suggest that judges may be among the least qualified to apprehend the artistic quality of a film director's work. See *United States* v. *Thirty-Seven Photographs*, 402 U.S. 363, 380 (Mr. Justice Black, dissenting opinion).

The director, writer, actors, and cameramen involved in the production of "Carnal Knowledge" demonstrated great talent. It is manifest, even to one who does not have any

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[3] One cannot full appreciate the direction of the performance of Ann-Margret in "Carnal Knowledge" without knowing the limitations of the roles in which she had previously been cast.

[4] There are, for example, pronounced differences in the colors of Jonathan's two apartments. The whiteness of the second was intended to suggest a change in Jonathan's condition—not in him—and to evoke an earlier image.

[5] Judith Christ, critic of *New York Magazine*, wrote: "The film is physically brilliant, with Nichols using the camera to near X-ray-plate effect, concentrating (as he never has before) on the face, the gesture, the tiny scene—and achieving broad strokes of realism thereby. Unlike too many of today's films, *Carnal Knowledge* lasts beyond the watching; it sticks to the mind-ribs and bears long retrospection: a feast of a film."

knowledge of film-making, that the work of all involved in the production of "Carnal Knowledge" is, at the least, of a high quality. That is sufficient to bring the film within the protection of the First and Fourteenth Amendments. In *Kois* v. *Wisconsin*, 408 U.S. 229, the members of the present Court reviewed the conviction of the publisher of an unpolished poem describing sexual intercourse. The Court noted, in reversing the conviction, that although "the author's reach exceeded his grasp" the work at least bore "some of the earmarks of an attempt at serious art." (408 U.S. at pp. 231, 232.) In this case, the attempt to produce a work of serious art was successful. See also *Papish* v. *University of Missouri Curators*, 410 U.S. 667.

POINT II

The Statutes under which the Appellant was Convicted are Unconstitutional, for they Sanction the Application of "Local" Community Standards in Determining whether [redacted] Material is Obscene.

Another basic guideline set by the Court in *Miller* v. *California*, 413 U.S. 15, for the identification of obscenity, is "whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest" *Miller* v. *California*, 413 U.S. at p. 24. The Court concluded in *Miller* that the First Amendment does not require the application of *national* community standards (413 U.S. at p. 31). The Court did not address itself to the question of whether the community standards to be applied (in deciding whether material arouses prurient interest) must be the standards of a state or may be those of a city, village or neighborhood in which the triers of the facts reside.

As noted before, the Georgia Supreme Court ruled that juries may consider state *or* local community standards in deciding whether material is within the prohibition of the statutes that *Jenkins* allegedly violated. *Jenkins* v. *State*, 230 Ga. 726, 199 S.E. 2d at p. 184. The State Court's construction

of the statutes is conclusive. *Kingsley International Pictures Corp.* v. *Regents,* 360 U.S. 684, at p. 688; *Speiser* v. *Randall,* 357 U.S. 513, at p. 519. The Justices of the Georgia Supreme Court assumed that the jurors in this case applied the standards of Dougherty County in judging the film obscene, for there had not been objection to the showing of "Carnal Knowledge" in any other part of the State.

A rule permitting judges and jurors to apply the singular standards of a town, county or rural area in deciding whether material is obscene would impose an intolerable burden on the distribution and dissemination of communication.[6] It is not feasible to prepare different versions of books, magazines and films for distribution in different parts of each of the states. As Mr. Justice Brennan wrote in *Jacobellis* v. *Ohio,* 378 U.S. 184:

> "We do not see how any 'local' definition of the 'community' could properly be employed in delineating the area of expression that is protected by the Federal Constitution. MR. JUSTICE HARLAN pointed out in *Manual Enterprises, Inc.* v. *Day,* 370 U.S.[478], at 488, that a standard based on a particular local community would have 'the intolerable consequence of denying some sections of the country access to material, there deemed acceptable, which in others might be considered offensive to prevailing community standards of decency. Cf. *Butler* v. *Michigan,* 352 U.S. 380' " (378 U.S. at p. 193).
>
> * * *
>
> "Furthermore, to sustain the suppression of a particular book or film in one locality would deter its dissemination in other localities where it might be held not obscene, since sellers and exhibitors would be reluctant to risk criminal conviction in testing the variation between the two places. It would be a hardy person who would sell a book or

[6] The burden is increased by the possibility of prosecution in the district in which the material was found obscene, if the material is, thereafter, merely shipped through the district. *Reed Enterprises* v. *Clark,* 278 F.Supp. 372, aff'd 390 U.S. 457.

exhibit a film anywhere in the land after this Court had sustained the judgment of one 'community' holding it to be outside the constitutional protection. The result would thus be 'to restrict the public's access to forms of the printed word which the State could not constitutionally suppress directly.' *Smith* v. *California*, 361 U.S. 147, 154" (378 U.S. at p. 194).

Although it did not reach the conclusion suggested by its language, this Court wrote in *Miller* v. *California*, 413 U.S. at p. 30, "Under a National Constitution, fundamental First Amendment limitations on the powers of the States do not vary from community to community * * *." The Court decided in *Miller* that the question of obscenity may be judged by the mores of a State. We do not believe "a lesser geographical framework for judging this issue"[7] may constitutionally be permitted.

There is no logical or social justification for a rule that would countenance the suppression of a work in one city, after it was held entitled to constitutional protection in other cities of the same State. There is no great danger of moral degradation, and certainly no sacrifice of state sovereignty, if the standards of the state, rather than the several standards of lesser geographical areas, are accepted as the norm.

POINT III

The Statutes Allegedly Violated by the Appellant Infringe the Right of Communication Protected by the First and Fourteenth Amendments of the Constitution.

In the first and second points of this brief, it is argued that if the lower courts had followed the appropriate guidelines they could not have found "Carnal Knowledge" obscene. However, the *amicus curiae* is of the opinion that *all* communication to adults who wish to receive it, is protected against regulation by the First and Fourteenth Amendments. This case furnishes an

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[7] The phrase is Mr. Justice Harlan's in *Manual Enterprises, Inc.* v. *Day*, 370 U.S. 478 at p. 488.

occasion for a reconsideration of this Court's decisions that obscenity is not within the area of constitutionally protected speech or press.

Although the Court in *Miller* described its guidelines for isolating hard-core pornography, as "concrete" (413 U.S. at p. 29), people of common intelligence cannot reasonably anticipate their application in any except extreme cases. *Connally* v. *General Construction Co.*, 269 U.S. 385, 391; *Winters* v. *New York*, 333 U.S. 507, 518. There cannot be any safeguard against arbitrary application of the standards:

> "(a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest * * *;
>
> "(b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined * * *;
>
> "(c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." (*Miller* v. *California*, 413 U.S. 15, at p. 24.)

Mr. Justice Brennan wrote, dissenting in *Paris Adult Theater I* v. *Slaton*, 413 U.S. 49, at p. 84: " * * * I am reluctantly forced to the conclusion that none of the available formulas, * * * can reduce the vagueness to a tolerable level while at the same time striking an acceptable balance between the protections of the First and Fourteenth Amendments, on the one hand, and on the other the asserted state interest in regulating the dissemination of certain sexually oriented materials. Any effort to draw a constitutionally acceptable boundary on state power must resort to such indefinite concepts as 'prurient interest,' 'patent offensiveness,' 'serious literary value,' and the like. The meaning of these concepts necessarily varies with the experience, outlook, and even idiosyncracies of the person defining them. Although we have assumed that obscenity does exist and that we 'know it when [we] see it,' *Jacobellis* v. *Ohio*, [378 US 184] at 197 (STEWART, J., con-

curring), we are manifestly unable to describe it in advance except by reference to concepts so elusive that they fail to distinguish clearly between protected and unprotected speech."

It is not possible to formulate a test, or to draw a Plimsoll line, that will enable courts readily to distinguish communication that is constitutionally protected, from material that may be punished as obscene. This case furnishes an example of the likelihood that, unless the Court reconsiders its position, laws punishing the publication or distribution of communication said to be obscene, will be misapplied and freedom of speech and press will be curtailed.

In *Miller* v. *California,* 413 U.S. 15 at p. 25 this Court gave its assurance that it and other appellate courts would stand as guardians against derogation of the constitutional right of expression. But there are not many publishers or film producers willing and able to bear the staggering expense of appeal to this Court; and at least on occasion when the right of expression is denied, it may not be vindicated. We can ill afford the loss of any work of value.[8]

CONCLUSION

For the Reasons Outlined, the Judgment Appealed from Should Be Reversed.

Respectfully submitted,

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[8] As Mr. Justice Brennan pointed out in his dissent in *Paris Adult Theater I* v. *Slaton,* 413 U.S. at p. 85, fn. 9, the Constitution protects the right to receive communication as well as the right to publish it.

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October Term, 1973

No. 73-557

BILLY JENKINS,

Appellant,

v.

STATE OF GEORGIA,

Appellee.

BRIEF OF ASSOCIATION OF AMERICAN PUBLISHERS, INC. AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT

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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-557

BILLY JENKINS,

Appellant,

v.

STATE OF GEORGIA,

Appellee.

BRIEF OF ASSOCIATION OF AMERICAN PUBLISHERS, INC. AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT

Statement

This *Amicus Curiae* brief is submitted on behalf of the Association of American Publishers, Inc. (hereinafter referred to as the "AAP") pursuant to Rule 42 of the Rules of the Supreme Court of the United States, in support of Appellant. Counsel for both Appellant and Appellee have granted written consent for the filing of this brief.[1]

1. Filed herewith is a letter dated January 14, 1974 from Tench C. Coxe, Esq., counsel for appellant, specifically granting such request. Also filed is a copy of a letter from Carter Goode, Esq., counsel for appellee, addressed to the Clerk of this Court granting general consent for all such *amicus* briefs. The AAP understands that the orginal of this letter is on file in the Clerk's office and relies thereon. In the event such letter is not sufficient consent, the AAP respectfully requests the Court to deem the following Section hereof entitld "Interest of the *Amicus*" as a motion for leave to file this *amicus* brief.

Interest of the *Amicus*

The AAP is a trade association organized under the laws of the State of New York. It is composed of publishers of general books, textbooks and educational materials. Its more than 260 members, which include many university presses and religious book publishers, publish in the aggregate the vast majority of all general, educational and religious books produced in the United States. These works are distributed in thousands of bookstores, department stores, drug stores, newsstands and other outlets in towns, villages and cities throughout the United States.

This Court has not sustained any obscenity conviction of any member of the AAP since 1948 when an equally divided Court affirmed a conviction for the sale of *Memoirs of Hecate County,* written by Edmund Wilson and published by Doubleday & Co., Inc. a member of the AAP.[2] Notwithstanding this record, members of the AAP are directly and significantly affected by the decisions of this Court in obscenity cases and by the ensuing legislative, judicial and prosecutorial actions which flow from those decisions. As the 1948 conviction involving Edmund Wilson's important and acclaimed work indicates, the "obscenity problem"[3] has long afflicted members of the AAP. Yet, since June 21, 1973 when this Court handed down its decision in *Miller* v. *California,* —— U.S. ——, 93 S.Ct.

2. *Doubleday & Co., Inc.* v. *New York,* 335 U.S. 848 (1948).

3. As used herein the phrase "obscenity problem" refers not only to the alleged proliferation of obscene or pornographic materials but to the detriments to protected expression flowing from efforts to curb pornography.

2607 (1973) and its companion cases, the "obscenity problem" has assumed greater magnitude for the members of the AAP and, indeed, for all those involved in disseminating ideas and information to the American public at large.

Hence, although the instant appeal involves the medium of motion pictures and not books and although the conviction is against an exhibitor and not a publisher, the issues involved herein are identical for all. While no member of the AAP has at any time been involved with the creation, production, distribution or exhibition of the film "Carnal Knowledge" the decision by this Court on this appeal will directly affect AAP's member publishers. As the conviction of Billy Jenkins amply demonstrates, judicial decisions and legislative enactments with respect to obscenity are not limited in their effects on the panderers of "hard core" pornography. And the AAP believes that this Court only intended to provide guidelines for isolating "hard core" pornography. Indeed, in *Miller* the majority of this Court by the Chief Justice stated:

> "[Today] a majority of this Court has agreed on concrete guidelines to isolate 'hard core' pornography from expression protected by the First Amendment." (93 S. Ct. 2607, 2617)

It was further stated that:

> "Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct specifically defined by the regulating state law, as written or construed." (*id.* at 2616)

Notwithstanding this clearly expressed intention, the conviction of Billy Jenkins for exhibiting the widely ac-

claimed film "Carnal Knowledge" illustrates that a limited intention does not necessarily result in a limited effect.

In the June decisions, all of the justices of this Court acknowledged that the then-existing guidelines for defining obscenity had failed. Based on experience since June 1973, the AAP submits that the guidelines in *Miller* and its companion cases also have failed. Much "hard core" pornography continues to thrive while many works, traditionally afforded First Amendment protection, have fallen prey to the heavy hand of censorship.[4] This failure to achieve the intended goals results not from an unworkable definition *per se*, but from the inherent impossibility of devising any definition.[5]

Although the AAP joined with others in a brief *amici curiae* in support of Appellant's Jurisdiction Statement herein[6] urging the Court to clarify certain aspects of the *Miller* guidelines (the misinterpretations of which led to the decision of the court below), it now respectfully requests the Court to consider all aspects of the "obscenity problem" in hearing this appeal. The AAP urges the Court to fashion a new approach to the "obscenity problem" and it files this brief as a friend of the Court with the intention of assisting the Court in analyzing the problems and suggesting the solutions.

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4. The failure of the *Miller* guidelines to carve out "hard core" pornography and to protect other expression is discussed at length in The New York Times, December 9, 1973 §2 (Arts and Leisure) in *What Has the Court Saved Us From?* at 3 and *And What About the Peeps* at 15.

5. See *Paris Adult Theatre I* v. *Slaton*, —— U.S. ——, 93 S.Ct. 2628, 2642-2663 (1973) (Brennan, J. dissenting).

6. Leave to file such joint *amici* brief was granted on December 10, 1973.

ARGUMENT

POINT I

There is no basis nor reason for holding that "obscene" material is outside the ambit of First Amendment protection.

The AAP readily acknowledges that the First Amendment has never been treated as an absolute.[7] It does not disagree with limitations on expression in any number of circumstances—the malicious cry of "fire" in a crowded theatre being but one example. Other examples are plentiful. As set forth in the majority opinion in *Paris Adult Theatre*, 93 S.Ct. at 2637, the absolute rights of free expression and assembly have been curtailed legitimately by antitrust, security and other regulatory laws, both federal and state. But these limitations are directed toward commercial transactions involving fraud and misrepresentation which result in demonstrable harm to others.

Until the decisions in *Miller* and *Paris Adult Theatre*, this Court did not even suggest that obscene expression may be proscribed because of some harm it may create. Indeed, notwithstanding the Court's emphasis on "the quality of life," "total community environment" and "tone of commerce" in *Paris Adult Theatre*,[8] the decisions last June were squarely based on the holding in *Roth* v. *United States*[9] that "obscenity is not within the area of constitutionally protected speech."[10]

7. *Miller* at 2614 citing *Breard* v. *Alexandria*, 341 U.S. 622, 642 (1951).

8. 93 S.Ct. at 2635.

9. 354 U.S. 476, 484-485 (1957).

10. *Miller*, 93 S.Ct. at 2613.

The AAP believes that there is no basis for dealing with the "obscenity problem" from this posture. Although not controlling, it appears clear that the history of the First Amendment does not afford the basis for the obscenity exception.[11] No federal obscenity statute of any kind was enacted until 1842,[12] many decades after the adoption of the First Amendment. As far as the colonies were concerned, only Massachusetts had a law that was potentially applicable to sexual material, although it was directed toward blasphemy.[13] And no known prosecutions under it occurred until 1821.[14] Only towards the end of the nineteenth century with Anthony Comstock's formation of the Committee for the Suppression of Vice did obscenity become an issue in this country.[15]

Just as there is no historical basis for treating obscenity as outside the First Amendment, there is no reason to do so. Every other limitation on freedom of expression is based on a determination that, absent some restriction, demonstrable harm will result. As this balancing test has been used to place aspects of commercial regulation above speech, mentioned above, it has been used to curtail political speech which presents a "clear and present danger"[16] and it has been used to penalize libelous speech which directly harms the target of such speech. Although the test for determining

11. For a full summary of early history of the treatment of obscenity see The Report of the Commission on Obscenity and Pornography (Random House 1970) Part Three, §IV A at 348-354.

12. 5 Stat. 566.

13. Province Laws 1711-12, ch. 6, §19 (1662).

14. *Commonwealth* v. *Holmes,* 17 Mass. 336.

15. Commission Report at 353.

16. See, *e.g., Dennis* v. *United States,* 341 U.S. 494 (1951).

whether speech is protected varies with the circumstances, each of these tests is rooted in the premise that regulation is justified only because of the dangerous consequences of the speech—the speech itself is not the evil.[17]

Only obscenity is treated differently. And that different treatment began recently with this Court's decision in *Roth*. Prior to 1957 some judges applied the traditional First Amendment terms to sexually explicit materials reasoning that general prohibitions were invalid absent a finding that such materials create a danger.[18] Although the Court set forth reasons in *Roth* for holding that it was not necessary to apply the traditional First Amendment tests to obscenity—it being outside the First Amendment—commentators have suggested that the exclusion solution was followed in *Roth* because of the absence of any evidence of the consequences of such speech.[19]

Now, however, evidence on the consequences of obscenity has been marshaled and analyzed in the Report of the Commission on Obscenity and Pornography. There is no longer any justification to deal with obscenity on a theoretical basis. Although the AAP is, with all due respect, rather shocked that the Court failed in *Miller* and its companion cases to heed or acknowledge the findings of the Commission it notes with a mixed reaction that the Court

17. *The Supreme Court*, 1972 Term, 87 Harv. L. Rev. 1, 162 n. 19.

18. See, *e.g.*, *United States* v. *Roth*, 273 F. 2d 796, 812-817 (2d Cir. 1956) (Frank, J. concurring).

19. See *The Supreme Court, 1972 Term*, 87 Harv. L. Rev. 1, 162 n. 19, citing Kalven, *The Metaphysics of the Law of Obscenity*, 1960 Sup. Ct. Rev. 1, 9-12 and Monaghan, *Obscenity, 1966: The Marriage of Obscenity Per Se and Obscenity Per Quod*, 76 Yale L.J. 127, 130-131 (1966).

in *Paris Adult Theatre* did go beyond the pure exclusion theory in holding the states justified in prohibiting "hard core" pornographic materials because of countervailing interests.[20]

The AAP urges the Court to abandon the exclusion theory entirely and, instead, to deal with obscene speech in the same fashion it deals with all other speech which, because of the circumstances of its publication or use, may be properly regulated under traditional First Amendment considerations.

POINT II

Traditional First Amendment considerations militate against allowing the prohibition of any sexually-oriented speech.

A. Reasons advanced for prohibiting sexually-oriented speech must be evaluated.

Regarding obscenity in traditional First Amendment terms means balancing all interests and concerns, with a strong presumption in favor of free expression. The AAP respectfully submits that any such balancing must take into consideration the findings of the President's Commission. One of the four tasks assigned by Congress in establishing the Commission (P.L. 90-100) was "to study the effect of obscenity and pornography on the public, and particularly minors, and its relationship to crime and other antisocial behavior." While the AAP does not suggest that the Court is bound by the conclusions of the Commission, it is at a loss to understand why the Court has completely

20. 93 S. Ct. at 2635.

ignored the extensive research conducted by this group of distinguished and disinterested persons. Even those members of the Commission who dissented from the recommendations of the Commission, and on whom this Court has seen fit to rely, concurred in the basic Commission finding that: "Empirical research designed to clarify the question has found no reliable evidence to date that exposure to explicit sexual materials plays a significant role in the causation of delinquent or criminal sexual behavior among youth or adults."[21]

Although this Court inexplicably ignored the Commission's Report in its decisions of June 1973, the Court in *Stanley* v. *Georgia*, 394 U.S. 557, 566-567 (1969), a year before issuance of the Report, presaged the findings. There the Court acknowledged that "[t]here appears to be little empirical basis for [the assertion] that exposure to obscene materials may lead to deviant sexual behavior or crimes of sexual violence." Accordingly, the Court there found that "Given the present state of knowledge, the State may no more prohibit mere possession of obscene matter on the ground that it may lead to antisocial conduct than it may prohibit possession of chemistry books on the ground that they may lead to the manufacture of homemade spirits."

Without citing any new evidence, this Court, four years after *Stanley* and three years after issuance of the Commission's Report, sought to bolster its holding in *Paris Adult Theatre* by alluding to an "arguable correlation between obscene material and crime" which the Court believed was

21. Commission's Report at 169.

indicated in the dissenting statement of commissioners Hill and Link.[22] Yet the Hill-Link statement disavowed the need to determine the existence of any such cause-effect relationship between obscenity and crime. Instead, their expressed concern was with "public morality" and "attitudes.[23] The Court's discussion in *Paris Adult Theatre* on the interest of the states in the "quality of life" etc. does, *Amicus* suspects, most accurately reflect what the Court was, in fact, putting on the scale opposite the heavy First Amendment presumption afforded to all speech.

B. The reasons advanced for prohibiting sexually-oriented speech are not sufficiently compelling to justify intrusions on other speech.

The AAP is in no position and makes no attempt to argue the merits of those allegedly legitimate interests. For the sake of argument, *Amicus* will concede that the states do have such interests in "the quality of life," "the total community environment" and the "tone of commerce." But the AAP submits that such interests cannot realistically be pitted solely against the right to commercially disseminate "hard core" pornography. In view of the number of obscenity convictions reversed by this Court over the years,[24] the AAP believes the Court can take judicial notice of the fact that prohibitions aimed solely at obscenity catch a great deal of other—and protected—material in their net.

22. 93 S. Ct. at 2635.

23. Commission's Report at 458.

24. No fewer than 31 cases were reversed with reference to *Redrup* v. *New York*, 386 U.S. 767 (1967) alone. These are cited by Brennan, J. at 93 S.Ct. 2647, n. 8.

Indeed, works which are devoid of any negligible quantum of explicit sexual content have been attacked on the alleged authority of obscenity prohibitions. In cases involving the publication of underground and campus newspapers and the use of certain materials in the classroom, the underlying objections of the forces of censorship are the controversial social or political contents of such works.[25]

This misdirected use of obscenity legislation existed long before the decisions of last June, but the AAP regretfully notes that this aspect of the "obscenity problem" was not cured by the decisions of last June—notwithstanding the Court's intention to limit prohibitions to "hard core" pornography. For example:

In November 1973, all known copies of Kurt Vonnegut's novel *Slaughterhouse Five* were burned in Drake, North Dakota and next on the list to be destroyed by orders of the local schoolboard were *Deliverance* by James Dickey and an anthology of short stories by Ernest Hemingway, William Faulkner and John Steinbeck.[26]

In September 1973, pages were removed from Edgar Lee Masters' *Spoon River Anthology* prior to use by stu-

25. See, *e.g.*, *Kois* v. *Wisconsin*, 408 U.S. 229 (1972); *Papish* v. *University of Missouri Board of Curators*, —— U.S. ——, 93 S.Ct. 1197 (1973); *Washington Free Community* v. *State's Attorney*, 300 F. Supp. 487 (D. Md. 1969); and *Parducci* v. *Rutland*, 316 F. Supp. 352 (M.D. Ala. 1970).

26. The New York Times, Nov. 11, 1973 and Nov. 16, 1973. Similarly, a school teacher in McBee, South Carolina, has been charged with an obscenity offense for assigning *Slaughterhouse Five*. Dunn, N.C., Record, October 29, 1973.

dents because they contained the words "harlot", "bare breast", "free love" and "lesbian".[27]

Also last fall, Claude Brown's *Manchild in the Promised Land* was banned from school libraries by the Baltimore School Board. When questioned one of the proponents of the ban said of the book which describes growing up in Harlem: "Why does he [the author] have to tell it like it is? Why can't he tell it like it should be?"[28] And in Orem, Utah a bookseller was charged with selling *A Clockwork Orange* by Anthony Burgess.[29]

The above examples, which involve books published by members of the AAP, and many similar instances not enumerated, do not derive solely from the difficulty inherent in drawing the line to separate "hard core" pornography from protected speech. The definitional problem arises with material in the grey area—that which is not clearly on either side of the line dividing protected from unprotected speech. The examples discussed above are not grey materials; in most cases, these are prized classics of American literature. They are attacked because they are unpleasant, disturbing or controversial. In short, they represent the very type of expression which the First Amendment was adopted to protect.[30]

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27. The New York Times, September 26, 1973 at 39.

28. The New York Times, December 9, 1973.

29. Pace, *Fears of Local Censorship Haunt the Book Trade*, The New York Times, January 7, 1974.

30. "The First Amendment was designed 'to invite dispute,' to induce 'a condition of unrest,' to 'create dissatisfactions with conditions the way they are,' and even to stir 'people to anger.' *Terminiello* v. *Chicago*, 337 U.S. 1, 4 * * *." (*Miller* at 2626, Douglas, J. dissenting.)

The AAP respectfully submits that, in applying the traditional First Amendment test to expression with sexual content, the Court must consider the two distinct sides of the "obscenity problem": One side is, of course, whether the reasons advanced for prohibiting certain sexually-explicit materials are sufficiently substantiated by the available evidence. This cannot be done without some consideration of the Commission's Report. The other side is, *Amicus* believes, equally clear. Are the reasons, assuming they exist, to allow the restriction of "hard core" pornography sufficiently compelling to tolerate the inevitable censorship of many works which cannot be deemed obscene under any constitutional definition? The AAP submits they are not and urges the Court to so hold.

POINT III

The problems created by *Miller* demonstrate that a different approach to the "obscenity problem" is required.

Even if the Court determines, after consideration of the arguments advanced in Points I and II above, on whatever rationale, that the states and the federal government may proscribe "hard core" pornography, the Court is next faced with the apparently impossible task of articulating a definition of such material. For all of the reasons set forth in Mr. Justice Brennan's dissenting opinion in *Paris Adult Theatre*,[31] the AAP believes that all prior and existing definitions are void-for-vagueness.

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31. 93 S.Ct. at 2642-2663.

A. *Miller* has exacerbated the "obscenity problem".

Although Mr. Justice Brennan could only speculate as to the consequences of the new test set forth in *Miller*, experience since last June demonstrates the accuracy of such speculation. Instead of curing or even improving "the intractable obscenity problem"[32] the test developed last June has made it worse. The conflicting reactions by the nation's judiciary as to how to determine the constitutionality of pre-*Miller* statutes is but one indication of the confusion *Miller* has generated. Just since the time the Court noted probable jurisdiction in the instant case, the highest courts of New York and Louisiana have come out on opposite sides of the same question—*i.e.*, whether their respective state statutes are constitutional in light of their failure to specifically define "sexual conduct".[33]

The confusion over the need to specifically define sexual conduct as well as other ambiguities in *Miller* were discussed by Judge Harold Leventhal of the United States Circuit Court of Appeals for the District of Columbia Circuit in an article in the American Bar Association Journal last November.[34] Among the questions noted by Judge Leventhal is "whether the community can be more local than a state—a county, or a city, or a metropolitan area—

32. *Interstate Circuit, Inc.* v. *Dallas*, 390 U.S. 676, 704 (1968) (Harlan, J. concurring and dissenting).

33. *People* v. *Heller*, —— U.S. ——, 93 S.Ct. 2789, *on remand* —— N.Y.2d ——; *Louisiana* v. *Shreveport News Agency, Inc.*, —— La. ——, 42 U.S.L.W. 2344 (Dec. 3, 1973). See also examples of similar conflicting judicial interpretations of *Miller* set forth in notes 6, 7 and 10 in the brief *amici curiae* in which the AAP joined with others in support of Appellant's Jurisdictional Statement, that brief is referred to above in "Interest of the *Amicus*."

34. 59 A.B.A.J. 1261-1266 (Nov. 1973).

and, if so, under what circumstances." He also wonders whether "the four categories included in the L.A.P.S. [literary, artistic, political, scientific] test constitute an exhaustive catalogue? * * * What for example, about a serious sex education book?" And citing *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495 (1952), he goes on to *presume* that "the Court's reference to 'serious' L.A.P.S. values does not outlaw the comic side of literary or artistic expression."

These and similar questions as to the meaning and proper application of *Miller* are not simply academic concerns. They have arisen regularly since last June in towns throughout the United States. Below are just a sample of the myriad of instances in which mischievous assaults on First Amendment rights have been perpetrated under the banner of *Miller*:

In Longwood, Florida, Police Chief Dowell announced that the time had come to enforce a 1968 criminal ordinance prohibiting the sale or exhibition of any "pornographic" material. He defined obscenity as "Anything obscene humanly speaking, is also obscene in a book." To elaborate he gave the example of a picture of a woman "in the state of undress" since a woman would be arrested if she appeared that way in public.[35] Absurd as this statement of the test may seem at first glance, it is identical in approach to the definition of obscenity used to convict Billy Jenkins under Georgia Code Ann. §26-2105 as combined with §26-2011.

In New Baltimore, Michigan, an ordinance was adopted on October 23, 1973 which, in its specific definitions was so

35. Sanford, Fla. Herald, August 14, 1973 and Longwood, Fla. Citizens News, August 23, 1973.

encompassing that the Police Chief said that "even baby powder advertisements depicting naked infants are illegal".[36] Regardless of whether prosecutions are commenced under such an ordinance, its adoption, with the attendant publicity, inevitably results in the withdrawal from sale of materials which are never judicially challenged or tested.

Similar threat or harassment campaigns have even been initiated by local judges. In Nelson County, Kentucky, Judge James A. Sutherland announced that the local citizens "don't condone" and "won't tolerate" magazines such as *Playboy*. Sutherland stated "I think I can speak for the vast majority of the people of this county • • • Now the word has gotten out and I believe the people who were offering such literature for sale have ceased. They said they would not have it on their shelves were it not for a certain demand."[37] As is clear, this self-proclaimed censor—without the assistance of a judicial proceeding—has eliminated a whole category of reading material which, he admits, was sought out by members of the community.

In other communities, letters have been sent to the distributors of reading materials by local officials setting forth their interpretations of state laws and Supreme Court rulings and requesting that certain materials be removed from sale. One such letter, from the Mayor of the City of Shelbyville, Kentucky, is reproduced as an appendix hereto. In another community, Oklahoma City, an assistant District Attorney changed his litigation tactic so as to preclude the publishers of threatened publications from intervening to defend the materials. In so doing, he said

36. The Detroit Free Press, November 6, 1973.

37. Louisville, Ky. Courrier Journal, September 29, 1973.

"We don't want a court adjudication on obscenity * * * We don't need such an interpretation, we've accomplished our purpose by cleaning up 35 newsstands."[38]

B. Only regulation of the circumstances of distribution should be allowed and such regulation should be by civil proceeding.

The AAP hopes that on the basis of the few examples given, the Court will take judicial notice of the pervasive mischief occasioned by its decision last June. While the AAP finds the instances of abuse profusive, it acknowledges that the solutions are far less abundant. It has concluded that the only realistic and workable solution is that set forth in the *Paris Adult Theatre* dissent by Mr. Justice Brennan. In short, the only way to avoid the inherent difficulties surrounding the *Miller* approach to the "obscenity problem" is to allow the dissemination of all sexually-oriented materials to willing adults in those circumstances that do not force such materials on unwillng adults and that do not expose them to unemancipated and unmarried minors.

Only such an approach will sidestep the morass of problems caused by the most recent attempt in *Miller*, as well as earlier ones, to separate out obscene materials in order to suppress them. This solution is by no means radical. Indeed, the solid constitutional foundation for allowing adults to see and read what they choose was fully

38. Oklahoma Journal, June 16, 1973. Although this occurred prior to *Miller* "cleaning up" the *bookstores* in Oklahoma City was swiftly accomplished after *Miller*. On the basis of two complaints, the police—by pressure alone—caused the removal from sale of the best-selling book, *The Joy of Sex*. See, Oklahoma Journal, December 15, 1972.

established in *Stanley* v. *Georgia*. While the Court may prefer to interpret *Stanley* as holding only that "a man's home is his castle," there is little question that *Stanley* was primarily a First Amendment case. Why else would the Court have noted that: "It is now well established that the Constitution protects the right to receive information and ideas" or that it is not relevant that "obscene materials in general, or the particular films before the Court, are arguably devoid of any ideological content" and that "The line between the transmission of ideas and mere entertainment is much too elusive for this Court to draw, if indeed such a line can be drawn at all"?[39]

In *Miller*[40] the majority rejected the solution suggested here and by Mr. Justice Brennan because (1) the avowed difficulty of line drawing to determine what materials are subject to any regulation still exists and (2) the Constitution does not authorize a distinction between willing "adults" and willing "juveniles." As to the latter, it is clear beyond peradventure that *Ginsberg* v. *New York*, 390 U.S. 629 (1968) has already found or assumed such authority. The AAP admits that the former problem raised has not yet been resolved. But even there, the Court, itself, has acknowledged the existence of a workable solution. In its decision in *Paris Adult Theatre*, the Court noted with approval the civil procedure used by Georgia to judicially determine whether the films involved were unprotected before charging any one with a criminal offense for their exhibition.[41]

39. 394 U.S. at 564, 566.

40. 93 S.Ct. at 2616.

41. 93 S.Ct. at 2634.

If such a prior civil determination were required prior to instituting criminal proceedings, the inability to draw precise lines would present less of a problem. Publishers, distributors, librarians and others would no longer be subjected to the opprobrium of criminal charges and the harshness of criminal fines if they fail to make the same preliminary determination as the local prosecutor, judge or jury. What is inevitably vague would at least be definite before some one is faced with a criminal record.

A constitutionally-mandated prior civil determination would solve the void-for-vagueness and due process infirmities inherent in the present approach. It is the obvious procedural device to satisfy the fundamental requirement that "no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed."[42]

Unless a prior civil proceeding is combined with a constitutional directive that consenting adults should have access to any sexually-oriented expression they choose, however, the First Amendment will remain emasculated. Even a civil injunction or declaratory judgment proceeding can be embarrassing and costly. To avoid such proceedings publishers and other disseminators will continue to steer further from the dividing line than necessary unless they are assured that the works they handle are not contraband which cannot be sold under any circumstances. Absolute prohibitions will still have a chilling effect on protected materials and "the right of the public to receive suitable access to social, political, esthetic, moral and other ideas

42. *United States* v. *Harris*, 347 U.S. 612, 617 (1954).

and expressions'"[43] will be infringed. If a mandatory prior civil determination were combined with carefully drawn restrictions on the circumstances of distribution, however, the right of consenting adults to access would be protected. Moreover, such regulations on the circumstances of distribution would, the AAP believes, allow the states to take effective steps to keep sexually-oriented materials from minors and offended adults. This proposed solution would allow the states to control matters of legitimate interest to them and it would restore our sorely battered First Amendment to its place as "the matrix"[44] of every other form of freedom our American system jealously cherishes and proudly provides.

Conclusion

In view of the foregoing, the Association of American Publishers, Inc. respectfully urges the Court to reverse the decision below and, in so doing, to consider and adopt the suggestions offered herein.

Respectfully submitted,

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43. *Red Lion Broadcasting Co.* v. *F.C.C.*, 395 U.S. 367, 390 (1969).

44. *Palko* v. *Connecticut*, 302 U.S. 319, 327 (1937) (Cardozo, J.).

CITY OF SHELBYVILLE

Founded 1792
Shelbyville, Kentucky 40065

1 October, 1973

W. B. PORTER
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CHESTER MATHES JR.
City Attorney
JOE L. PUCKETT
Vice-Director
JOHN G. FERNANDES
Treasurer
H. H. NEWTON
Assessor
HOWARD FLOOD
Fire Administrator
FRED BOND
Police Judge

E. BELCHER
Police Chief
ELMER HAWKINS
Housing Inspector
FLOYD WILLARD
Fire Chief
ERNEST HAWKINS
City Engineer
Construction
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HOWARD FLOOD
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RAY HARDESTY
HARRY LONG
LEE NOR MACK

TO ALL DISTRIBUTORS OF READING MATERIALS:

In compliance with K.R.S.436.100 and the U.S. Supreme Courts Decision on obscene literature (Pornography), Shelbyville City Council, in regular session, 5 July, 1973, voted unanimously to instruct the City Attorney and Chief of Police to take what action necessary to rid the City of publications that are not in keeping with the culture and religious climate of this community.

The standards of this Community does not permit nudity, profanity, or obscenity publically or in print. Many complaints, meetings, and discussions have taken place regarding the sale of printed publications considered obscene. This Community considers photo's or drawings of nudes, written sex stories, and profanity obscene. Some of the publications noted are: Playboy, Oui, Penthouse, Gallery, Cavalier, and others.

The City does not desire to make headlines, if it can be averted, by making raids, arrests, or passing license ordinances of such magnitude that a profit on the sale of any printed materials would be impossible. However, the people of this community will not tolerate further immoriality encourage ent--- especially where our youth are concerned. Therefore, we appeal to you to discontinue and cease stocking and selling any literature containing nude photo's, drawings, or other written obscenity. Otherwise, Headlines will have to be made.

Thanking you for your cooperation, compliance, and help in stamping out vice in Shelbyville.

Sincerely,

W.B. Porter
Mayor

JAN 24 1974

MICHAEL RODAK, JR., CLE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-557

BILLY JENKINS,

Appellant,

vs.

STATE OF GEORGIA,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF GEORGIA

AMICUS CURIAE BRIEF OF THE AMERICAN LIBRARY ASSOCIATION IN SUPPORT OF APPELLANT

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INTEREST OF THE AMERICAN LIBRARY ASSOCIATION

The American Library Association, founded in 1876, is a non-profit educational organization with its principal place of business located in Chicago, Illinois. Its membership includes more than 30,000 libraries, librarians, library trustees and members of the general public who are devoted to the development of library services in the United States.

The Association is the chief spokesman for the modern library movement in North America and, to a considerable extent, throughout the world. Through its membership and its

affiliation with its constituent state library associations, the American Library Association represents over 29,000 public, university and special libraries, over 90,000 elementary and secondary school libraries and media centers, and over 120,000 librarians.

The American library is an institution unique to American culture and tradition. Through libraries, citizens are provided essentially free access to books, periodicals, magazines, records, microfilms, pamphlets, films and other materials which they desire or require to satisfy their intellectual, emotional, recreational or professional interests.

In providing this service in the free society mandated by our Constitution, it is and has been the responsibility of libraries to make available books and other materials presenting all points of view concerning the problems, issues, and attitudes of the times. Libraries and librarians have, therefore, historically resisted efforts to limit their collections to only those materials reflecting attitudes, ideas, and literary styles bearing the imprimatur of governmental authority or the approval of a prevailing majority of the populace. As a result, the American library has become, in many respects, the Nation's most basic First Amendment institution. Indeed, libraries serve as a primary resource for the intellectual freedom required for the preservation of a free society and a creative culture.

The Georgia Supreme Court decision, to which this brief is addressed, has direct and serious implications for libraries and librarians, not only in Georgia, but throughout the Nation. As such, it is of immediate concern to the American Library Association. By affirming a criminal "obscenity" conviction of a motion picture theatre manager for showing the widely praised movie "Carnal Knowledge," the decision places libraries and librarians in direct fear of criminal prosecution. Without question, most library collections contain numerous works with sexual content equivalent to, if not greater than, that found in "Carnal Knowledge."

Furthermore, as detailed herein, the Georgia Supreme Court's opinion makes clear that its decision was an outgrowth of this Court's June 21, 1973 decisions.* Therefore, in reviewing the Georgia decision, the Court must necessarily reconsider those June 21, 1973 decisions.

The "Carnal Knowledge" ruling demonstrates that those June 21, 1973 decisions have serious potential for the widespread suppression of much constitutionally protected material, particularly through their effect on libraries and librarians. Confronted with the prospects of criminal prosecution, it is beyond question that libraries and librarians will tread a cautious path, erring on the side of caution to omit from their collections all materials which might possibly be attacked as "obscene." Such a "self-censorship" program must necessarily suppress constitutionally protected material, and thereby violate the First Amendment rights of libraries, librarians, publishers, authors, and the society they serve.

This brief is submitted in the hope that it will persuade the Court to reverse the Georgia decision below, and, in the process, to modify or reject the June 21, 1973 decisions. The Association has obtained the written consent of both Appellant and Appellee to the filing of this *amicus curiae* brief.**

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* *Miller* v. *California*, 413 U. S. 15 (1973); *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49 (1973); *Kaplan* v. *California*, 413 U. S. 115 (1973); *United States* v. *12 200-Ft. Reels of Super 8MM Film*, 413 U. S. 123 (1973); and *United States* v. *Orito*, 413 U. S. 139 (1973).

** True copies of the letters evidencing such consent have been lodged in the Clerk's Office.

ARGUMENT

I. THE CONCEPT OF "OBSCENITY" IS UNCONSTITUTIONALLY VAGUE AND OVERBROAD.

The Georgia Supreme Court's ruling conclusively demonstrates that this Court's attempt to define the permissible standards for the suppression of "obscene" materials is fundamentally and irreconcilably at odds with the First Amendment and the Due Process Clause of the Fourteenth Amendment. All the evils which the "void for vagueness" doctrine was designed to cure are manifest in the June 21, 1973 standards as shown by the Georgia court's application of those standards in the case at bar.

Vague laws are invalid, under the Due Process Clause of the Fourteenth Amendment: if they do not provide the public with fair notice of what is prohibited; if they are subject to arbitrary enforcement and application; or if they infringe on the exercise of protected rights. *Grayned* v. *City of Rockford*, 408 U. S. 104 (1972); *Papachristou* v. *City of Jacksonville*, 405 U. S. 156 (1972); *Gooding, Warden* v. *Wilson*, 405 U. S. 518 (1972); *Coates* v. *Cincinnati*, 402 U. S. 611 (1971); *Winter* v. *New York*, 333 U. S. 507 (1948). As stated in *Grayned* v. *City of Rockford, supra*, 408 U. S. at 108-109:

> "Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges and juries for resolution on an *ad hoc* and subjective basis, with the

> attendant dangers of arbitrary and discriminatory application. Third, but related, here a vague statute 'abut[s] upon sensitive areas of basic First Amendment freedoms, '. . . Uncertain meanings inevitably lead citizens to ' "steer far wider of the unlawful zone" . . . than if the boundaries of the forbidden areas were clearly marked.' " [Footnotes omitted]

Statutes which affect the area of First Amendment rights, like the Georgia and other "obscenity" statutes, are, therefore, particularly vulnerable to attack for vagueness, because "the standards of permissible statutory vagueness are strict in the area of free expression." *NAACP* v. *Button*, 371 U. S. 415, 432 (1963). A strict standard is imposed in the recognition that "the freedoms of expression . . . are vulnerable to greatly damaging but barely visible encroachments." *Bantam Books, Inc.* v. *Sullivan*, 372 U. S. 58, 65 (1963). A strict standard is particularly apt in the "obscenity" area where the line between the "obscene" and "non-obscene" is admittedly "elusive." *Stanley* v. *Georgia*, 394 U. S. 557, 566 (1969). *Cf. Miller* v. *California*, 413 U. S. 15, 24 (1973).

Under these standards, it is clear that the Georgia "obscenity" statute enforced in the present case, and other obscenity laws construed in harmony with this Court's June 21, 1973 decisions,* violate fundamental First and Fourteenth Amendment

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* In this brief, the Georgia criminal "obscenity" statute. Ga. Code Ann. §§ 26-2101 *et seq.*, is analyzed broadly with other similar "obscenity" statutes which have been or can be redrafted or authoritatively construed as embodying the definition of "obscenity" and the procedural rulings outlined in the Court's June 21, 1973 decisions. The analysis is so focused because this Court made clear in *Miller* v. *California*, 413 U. S. 15, 24 (1973) that applicable state law could be modified to comply with the holdings contained in those decisions through authoritative construction by state courts. Indeed, in its post-*Miller* denials of *certiorari*, the Court has simply vacated the state or federal judgment involved and remanded "for further consideration in light of" the June 21, 1973 decisions. *Carlson* v. *Minnesota*, 42 U. S. L. W. 3238 (U. S. Oct. 23, 1973); *Trinkler* v. *Alabama*, 42 U. S. L. W. 3239 (U. S. Oct. 23, 1973); *West* v. *Texas*, 42 U. S. L. W. 3240 (U. S. Oct. 23, 1973); *Roth* v. *New Jersey*, 42 U. S. L. W. 3240 (U. S. Oct. 23, 1973); *Harding* v.

rights. This fact becomes particularly self-evident when the impact of the statutes and the June 21, 1973 decisions upon libraries and librarians is considered.*

A. The Concept of "Obscenity" Does Not Provide Fair Notice of What Is Prohibited

In *Miller* v. *California, supra,* 413 U. S. at 27, the Court confidently predicted:

> "Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct specifically defined by the regulating state law, as written or construed."

The concern of the dissenters that the new definition of "obscenity" was as vague as its predecessor was dismissed by the majority with the statement that it was "doleful" to "assume that courts cannot distinguish commerce in ideas, protected by

U. S., 42 U. S. L. W. 3241 (U. S. Oct. 23, 1973); *McCrary* v. *Oklahoma*, 42 U. S. L. W. 3241 (U. S. Oct. 23, 1973); *Nissinoff* v. *California*, 42 U. S. L. W. 3384 (U. S. Jan. 8, 1974); *Sharp* v. *Texas*, 42 U. S. L. W. 3385 (U. S. Jan. 8, 1974). *See also Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49, 55 (1973). Furthermore, in that the Georgia Supreme Court made clear that it considered its holding in the case at bar to be well within the guidelines presented by the Court in the June 21, 1973 decisions, it is obvious that, if the more restrictive interpretations of the Georgia Supreme Court are held to be invalid, the definition of "obscenity" and the procedural rulings contained in the June 21, 1973 decisions likewise must fall.

* Libraries and librarians are not engaged in the "crass commercial exploitation of sex," *Paris Adult Theatre I* v. *Slaton, supra,* 413 U. S. at 63, with which the Court was so obviously preoccupied in its June 21, 1973 decisions. *See also, Id.*, 413 U. S. at 57, 63, 64 and 68, and *Miller* v. *California, supra,* 413 U. S. at 36. Nonetheless, the Georgia statute at issue here, as do most other "obscenity" statutes, clearly applies to libraries and librarians in their distribution of reading and other materials to the public. As demonstrated herein, the impact of these statutes on libraries and librarians, particularly in light of this Court's June 21, 1973 decisions, is substantial, and ominous for the continued free and robust dissemination of ideas.

the First Amendment, from commercial exploitation of obscene materials." *Miller* v. *California, supra,* 413 U. S. at 36.

Yet, the Court is now faced with a criminal conviction for the display in a public theatre of the critically acclaimed movie "Carnal Knowledge." That criminal conviction was obtained and affirmed through the application of all three essential elements of the Court's June 21, 1973 decisions—the *Miller* definition of "obscenity,"* the application by a jury of prevailing local community standards, and the absence of supporting expert testimony. Significantly, the film "Carnal Knowledge" is devoid of any actual "depiction or description of patently offensive 'hard core' sexual conduct," clearly has "serious . . . artistic . . . value," and obviously constitutes "commerce in ideas," rather than "commercial exploitation of sex."

To satisfy the Due Process Clause, a criminal statute must be sufficiently definite, in its description of what is prohibited, so that a person of reasonable intelligence can determine how to conduct himself. As stated in *United States* v. *Harriss,* 347 U. S. 612, 617 (1954):

> "The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed."

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* The Georgia Supreme Court made it clear that it considered "Carnal Knowledge" to be "obscene" under the *Miller* test. The Court stated at page 184:

> "This [*Roth-Memoirs* "obscenity"] test has been included in our law (Code Ann. § 26-2101(b)) thus making our present statute considerably more restrictive than the new test set forth in the recent case of *Miller* v. *California* . . ." *Jenkins* v. *State,* 199 S. E. 2d 183 (Sup. Ct. Ga. 1973).

Other courts have likewise interpreted the *Miller* formulation as permitting greater suppression of sexually oriented materials. *See, e.g., United States* v. *One Reel of Film,* 481 F. 2d 206, 208-209 (1st Cir. 1973).

It appears self-evident that, if judges on the Supreme Court of Georgia, presumably "persons of ordinary intelligence," cannot apply the Court's *Miller* formulation of "obscenity," so as to distinguish between clearly protected expression such as "Carnal Knowledge" and what is supposedly unprotected, the formulation is too indefinite to satisfy the Due Process Clause. Laymen, such as librarians, against whom an "obscenity" statute operates, simply cannot be expected to have any reasonable idea of "what the State commands or forbids," *Lanzetta* v. *New Jersey*, 306 U. S. 451, 453 (1939), if state supreme court justices do not.

1. The Terms Used to Define "Obscenity" Are Themselves Void for Vagueness.

The difficulty of the Georgia Supreme Court is, however, readily understandable. The terms employed in the *Miller* definition of "obscenity" are themselves inherently vague and indefinite. The Court defined "obscenity" as matter which "depict[s] or describe[s] sexual conduct" in a manner "which, taken as a whole, appeal[s] to the prurient interest in sex, which portray[s] sexual conduct in a patently offensive way, and which, taken as a whole, do[es] not have serious literary, artistic, political, or scientific value." *Miller, supra*, 413 U. S. at 24.

As stated, every library collection includes many works having sexual content. The "sexual revolution" acknowledged in *Miller, supra*, 413 U. S. at 36, has been reflected in current literature and periodicals. The public interest in sexual matters, therefore, makes it logical and necessary for libraries to have such materials. Many of these materials, particularly serious "sex education" books, encompass matter at least as explicit as "Carnal Knowledge." Yet, it is impossible to delineate the unprotected from the protected, under the terms employed by the Court. What appeals to prurient interests, is offensive, or lacks serious value depends upon the viewer or reader. A given work may appeal exclusively to the prurient interests of one person, be offensive to another, and have serious scientific

or artistic value for a third.* Librarians generally have no knowledge as to the specific purpose for which an individual is utilizing a given library work. Indeed, any requirement that librarians make such an inquiry would create a hostile, oppressive environment which itself would "chill" access to constitutionally protected works.

In *Coates* v. *Cincinnati*, 402 U. S. 611 (1971), the Court recently struck down for vagueness a municipal ordinance prohibiting three or more persons from congregating on a street "in a manner *annoying* to persons passing by." The Court held:

> "In our opinion this ordinance is unconstitutionally vague because it subjects the exercise of the right of assembly to an unascertainable standard, and unconstitutionally broad because it authorizes the punishment of constitutionally protected conduct.
>
> "Conduct that annoys some people does not annoy others. Thus, the ordinance is vague, not in the sense that it requires a person to conform his conduct to an imprecise but comprehensive normative standard, but rather in the sense that no standard of conduct is specified at all." 402 U. S. at 614.

The terms employed in the *Miller* formulation are no more precise or well-grounded than the term "annoying" in *Coates*. *See also Interstate Circuit, Inc.* v. *City of Dallas*, 390 U. S. 676, 682-683 (1968) ("sexual promiscuity"), and cases cited there.

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* This "subjective" element of the concept of "obscenity" is what clearly distinguishes it from the restrictions on speech imposed by the Federal Securities and Antitrust Laws. Those statutes establish restriction on speech which can be objectively measured, i.e. was there a misrepresentation of facts by an untruth or a material omission, or was there an agreement, either by word or by conduct, in restraint of trade. Consequently, the Court's reliance on those statutory proscriptions on commercial speech to justify its suppression of "obscenity", *see Paris Adult Theatre I* v. *Slaton*, *supra*, 413 U. S. at 61-62, was misplaced. Moreover, the "obscenity" proscriptions affect far more than commercial distribution, as herein demonstrated. What may be permissible in the commercial arena, is not necessarily so in the pure speech area. *Cf. Smith* v. *California*, 361 U. S. 147, 150-151 (1959).

2. The Court's Procedural Rulings Accentuate the Vagueness of the Concept of "Obscenity."

a. "Obscenity" Can Only Be Decided by the Trier of Fact.

The indefiniteness of the terms used to define "obscenity" is accentuated by the Court's ruling that the question of "obscenity" can only be established by a trier of fact applying the "contemporary community standards" of the "average person" in that community. *Miller, supra,* 413 U. S. at 30. In reality, therefore, a librarian cannot know whether a given work will result in prosecution until a jury or judge renders a verdict. Shockingly, that determination can come for the first time, as it did in the case at bar, in the context of a criminal prosecution for engaging in the distribution.

b. "Expert" Testimony Is Unnecessary to Support an "Obscenity" Conviction.

In reaching its verdict, the trier of fact, in many cases a jury, is instructed that the materials involved "obviously, are the best evidence of what they represent." *Paris Adult Theatre I* v. *Slaton,* 413 U. S. 49, 56 (1973). Expert testimony has, therefore, been declared to be largely irrelevant.

> "This ["obscenity"] is not a subject that lends itself to the traditional use of expert testimony. Such testimony is usually admitted for the purpose of explaining to lay jurors what they otherwise could not understand. Cf. 2 J. Wigmore, Evidence, §§ 556, 559 (3rd Ed. 1940). No such assistance is needed by jurors in obscenity cases; indeed, the 'expert witness' practices employed in these cases have often made a mockery out of the otherwise sound concept of expert testimony." *Id.*, 413 U. S. at 56, n. 6.

Therefore, a librarian's consultation with experts as to the potential "obscenity" of a work affords no significant protection, because such opinions can be substantially disregarded

by the trier of fact. Most librarians do not consider themselves qualified to determine whether a given work is legally "obscene" within the definition provided in *Miller*. Librarians do not receive any professional training which would qualify them to make such a judgment. Indeed, the librarian's own views as to the "serious literary, artistic, political or scientific value" of a given work are themselves irrelevant.

Consequently, despite a good faith belief in the "non-obscenity" of the material, a criminal prosecution is still possible. It is well-settled that the *scienter* required for a criminal conviction is not knowledge that the material is "obsence," but only knowledge of the general contents of the material. *People* v. *Williamson*, 24 Cal. Rptr. 734, 207 C. A. 2d 839, *cert. denied*, 377 U. S. 994 (1964).

c. Local, Not National, Community Standards Apply.

Lastly, the trier of fact is instructed to apply a local community standard. The librarian can never know in advance what "local community standard" will be applied.* Many libraries serve several communities, including combinations of urban and suburban communities and communities in different states.**

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* Indeed, *amicus* is at a total loss to understand what standard applies when a librarian may be subject to federal criminal prosecution, for example, for sending allegedly "obscene" materials through the mails when making an intra-library loan, or for importing such materials from outside the United States. Does a national standard apply for federal statutes? If so, how is the national standard different from local standards? If local community standards apply, is it the standard at the point of shipment or the point of receipt? If the applicable standard is at the point of receipt, how is the librarian to know what the community standard is of a community with which he or she is not familiar? The Court's decisions in *United States* v. *Orito*, 413 U. S. 139 (1973) and *United States* v. *12 200-Ft. Reels of 8MM Film*, 413 U. S. 123 (1973) do not shed light on these issues.

** A requirement that libraries adjust their conduct so as to satisfy the views of the most sensitive community would clearly be objectionable. *Cf. Butler* v. *Michigan*, 352 U. S. 380 (1957).

Ultimately, a librarian, in permitting the public access to a library collection, must do so at his or her peril. The librarian's good faith belief, based on professional judgment or expert opinion, that the work is not "obsence" can be disregarded by a trier of fact applying indefinite terms and a community standard which cannot reasonably be anticipated in advance.

3. The Concept of "Obscenity" Is Meaningless in the Context of Distribution Through a Library.

Moreover, it is the firm conviction of librarians that the Court's concept of "obscenity" is meaningless when examined in the context of a library distribution. The definition of "obscenity" adopted by the Court in *Miller* is designed for measuring works in the abstract. However, this Court has declared that the "obscene" or "non-obscene" character of a work can be controlled by the mode and manner of its distribution. In *Roth* v. *United States*, 354 U. S. 476, 495 (1957), Chief Justice Warren (concurring) stated:

> "The nature of the materials is, of course, relevant as an attribute of the defendant's conduct, but the materials are thus placed in context from which they draw color and character. A wholly different result might be reached in a different setting."

The Court quoted the Chief Justice in *Ginzburg* v. *United States*, 383 U. S. 463 (1966) and stated:

> ". . . [E]vidence of pandering may be probative with respect to the nature of the material in question and thus satisfy the *Roth* test." 383 U. S. at 474.
>
> ". . . [I]t is settled that the mode of distribution may be a significant part of the determination of the obscenity of the materials involved." 383 at 474, n. 15.

The Court concluded as a matter of law, that publications, which clearly were not "obscene" on their face, could be considered so if distributed in a manner designed to emphasize the sexually provocative aspects of the works. The Court like-

wise acknowledged that a different result could be achieved in a "controlled," a "neutral environment." *Id.*, 383 U. S. at 472. The obvious implication is that matter, which is arguably "obscene," may, as a matter of law, be rendered "non-obscene" when distributed in a controlled, neutral environment.

The passive, non-commercial distribution which takes place in the library setting creates such a neutral environment. The circumstances of presentation necessarily impede prurient appeal and emphasize serious value. Therefore, materials, declared "obscene" in the context of a commercial distribution, should be, as a matter of law, "non-obscene" when simply sitting on a library shelf. A librarian is, therefore, at a loss to determine in advance what might be "obscene" in the context of a library.

It should be obvious that the concept of "obscenity," adopted by this Court and construed by the Georgia Supreme Court, is too indefinite and meaningless to provide the fair, advance notice of what is criminal, and what is not, mandated by the Due Process Clause of the Fourteenth Amendment.

B. The Concept of Obscenity Is Subject to Arbitrary Enforcement and Application.

The second vice of a vague statute is that it is readily subject to arbitrary and erratic enforcement and application. That the concept of "obscenity" articulated by this Court in its June 21, 1973 decisions is subject to abuse is amply born out by the judgments below.

Billy Jenkins was convicted of showing the movie "Carnal Knowledge," a clearly protected work. As part of his defense, he proffered examples of actual "hard core pornography" then currently being distributed in the community. Apparently, there were no arrests or convictions for the distribution of those materials, which were substantially different in nature and content from "Carnal Knowledge." It is patently clear that people engaged in the distribution of written and other mate-

rials, such as librarians, are at the mercy of the local prosecutor's and judge or jury's conception of what is "obscene."

The concept of "obscenity," established by the Court, therefore, is just as susceptible to abuse as the vagrancy statute in *Papachristou* v. *City of Jacksonville*, 405 U. S. 156 (1972). There the Court unanimously struck down the statute, stating:

> "This ordinance is void for vagueness, both in the sense that it 'fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute,' *United States* v. *Harriss*, 347 U. S. 612, 617, and because it encourages arbitrary and erratic arrests and convictions. *Thornhill* v. *Alabama*, 310 U. S. 88; *Herndon* v. *Lowry*, 301 U. S. 242." 405 U. S. at 162.

In *Miller*, the Court explained that a major factor militating against abuse would be the power of appellate courts to make an independent review of the "obscenity" of the materials involved.

> "If a state law that regulates obscene material is thus limited, as written or construed, the First Amendment values applicable to the States through the Fourteenth Amendment are adequately protected by the ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary." *Millller* v. *California, supra*, 413 U. S. at 25.

However, the Georgia Supreme Court decision demonstrates how clearly *inadequate* that protection is. Ultimately, the only appellate protection is a declaration of "non-obscenity" by this Court, a result which is long delayed, if possible at all given the Court's docket.* Of course, it is well-settled that delay itself can impermissibly chill the exercise of First Amendment rights.

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* It should be noted that the Federal judiciary's ability to perform a protective function has been vastly limited by this Court's decision in *Younger* v. *Harris*, 401 U. S. 37 (1971), directing the Federal Courts not to intervene in pending state criminal prosecutions. Indeed, the Federal Courts have demonstrated an inclination to abstain in "obscenity" cases even in situations of non-pending proceedings. *See, e.g., Moore* v. *Younger*, Dkt. No. 72-990-H. P. (C. D. Cal. November 29, 1973) (three-judge panel).

Zwickler v. *Koota*, 389 U. S. 241, 252 (1967); *Baggett* v. *Bullitt*, 377 U. S. 360, 378-379 (1964).

C. The Necessary Effect of the Concept of "Obscenity" Is to Curtail Constitutionally Protected Rights.

The most constitutionally damaging consequence of a vague and overbroad statute is the "chilling effect" which it has upon the exercise of protected rights. *Gooding, Warden* v. *Wilson*, 405 U. S. 518, 521 (1972); *Coates* v. *City of Cincinnati*, 402 U. S. 611, 619-620 (1971). That the unfettered right to distribute and receive "non-obscene" materials is constitutionally protected is beyond question. *Bantam Books, Inc.* v. *Sullivan*, 372 U. S. 58, 65 (1963). Nonetheless, the necessary effect of the Georgia and other similar statutes, construed in light of the June 21, 1973 decisions, is to compel libraries, librarians, and others to suppress the distribution of constitutionally protected materials.*

Libraries and librarians have no economic incentive which would justify the risk of their personal freedom in order to insure the widest, or, indeed, any distribution of a particular work.** Therefore, given the impossibility of predicting what

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* The constitutionality of a statute must, of course, be tested by "the operation and effect of the statute in substance." *Near* v. *Minnesota*, 283 U. S. 697, 713 (1931).

** Philosophically, however, libraries and librarians are dedicated to the public's freedom to read, and to that end they seek to provide access to as broad and varied a spectrum of materials, expressing as many diverse and controversial positions, as their limited budgets permit. The American Library Association's "Library Bill of Rights," therefore, provides, in pertinent part:

> "1. As a responsibility of library service, books and other library materials selected should be chosen for values of interest, information and enlightenment of all the people of the community. In no case should library materials be excluded because of the race or nationality or the social, political, or religious views of the authors.
>
> 2. Libraries should provide books and other materials presenting all points of view concerning the problems and issues of our times; no library materials should be proscribed

will or will not be declared "obscene," librarians are certain to omit all materials from their collections which under any interpretation might possibly be declared "obscene." In view of the Georgia Supreme Court's ruling on "Carnal Knowledge", such a course of action will compel a review and "purge" of substantial portions of existing collections and cautious selection of future materials.*

In any such "purge," librarians are certain to "err on the side of caution." Most materials in a library, of course, are exclusively, or primarily, textual. However, the Court made clear in *Kaplan* v. *California*, 413 U. S. 115 (1973), that such materials are equally outside the purview of the First Amendment, if "obscene." Although it is unlikely that a library would have *Suite 69* in its collections, a library would be faced with the hard decisions of eliminating many materials, such as *Catch-22, Manchild In the Promise Land, Portnoy's Complaint, Everything You Ever Wanted to Know About Sex,** from its collection, in that those materials stand in the same relationship to *Suite 69* as "Carnal Knowledge" does to the movies involved in *Paris Adult Theatre I v. Slaton.*

Therefore, the Court's concept of obscenity necessarily inhibits the right of libraries and librarians to distribute constitutionally protected material. In violating the rights of

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or removed from libraries because of partisan or doctrinal disapproval.

3. Censorship should be challenged by libraries in the maintenance of their responsibility to provide public information and enlightenment.

4. Libraries should cooperate with all persons and groups concerned with resisting abridgment of free expression and free access to ideas."

* The requirement that all works be reviewed for "obscene" content will have a significant impact on library operations and costs. The presence of "obscene" content cannot be determined without the review of the entirety of all works. Librarians do not, in most cases, review their acquisitions prior to purchase. Rather, they purchase on the basis of published reviews and requests from patrons, or through a blanket order system from publishers.

librarians, the statute thereby violates the rights of library patrons to have access to constitutionally protected works. *Cf. Smith* v. *California*, 361 U. S. 147, 154 (1959).

> "The bookseller's self-censorship, compelled by the State, would be a censorship affecting the whole public, hardly less virulent for being privately administered. Through it, the distribution of all books, both obscene and not obscene, would be impeded."

It is, therefore, patently obvious, in view of the Georgia Supreme Court decision, that the Court's June 21, 1973 standards for suppressing "obscenity" are void for vagueness, due to their indefiniteness, potential for abuse, and incursions on protected rights.

II. THE GEORGIA CRIMINAL "OBSCENITY" STATUTE CREATES A COMPREHENSIVE SCHEME OF CENSORSHIP WHICH INCLUDES NONE OF THE CONSTITUTIONALLY REQUIRED PROCEDURAL SAFEGUARDS.

By permitting the suppressions of "obscene" materials, the Court's June 21, 1973 decisions sanction state "obscenity" statutes, like Georgia's and others,* which prohibit all forms of distribution, both commercial and non-commercial. These statutes effectively create a comprehensive system of censorship. The system is administered by the private individuals who are engaged in the distribution of written and other materials to the public. These private individuals, such as librarians, are coerced into acting as censors, by the threat of criminal prosecution. As a criminal prosecution can be commenced prior to any judicial determination that the material distributed is "obscene,"** the burden of censorship is placed directly on these private individuals.

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* *See, e.g.*, Cal. Penal Code §§ 311 *et seq.*; *Ill. Rev. Stats.*, S. H. A. ch. 38 §§ 11-20 *et seq.*; *N. Y. Penal Law*, §§ 235.00 *et seq.*

** In the present case, Billy Jenkins was convicted prior to any judicial determination that the movie "Carnal Knowledge" was obscene.

This Court has consistently held that any system of censorship must provide adequate procedural safeguards.* Those holdings are based on the recognition that a censorship decision not to distribute constitutes a total and final prior restraint. As stated in *Freedman* v. *Maryland*, 380 U. S. 51, 57-58 (1965):

> "Because the censor's business is to censor, there inhers the danger that he may well be less responsive than a court —part of an independent branch of government—to the constitutionally protected interests in free expression. And if it is made unduly onerous, by reason of delay or otherwise, to seek judicial review, the censor's determination may in practice be final."

The Court, therefore, has declared that censorship schemes must provide prompt notice to those affected, an adversary hearing as to the "obscenity" of the material, prompt judicial review of any such determination, and place the burden of seeking review on the censor. As stated in *Blount* v. *Rizzi*, 400 U. S. 410, 417 (1971):

> ". . . [T]o avoid constitutional infirmity a scheme of administrative censorship must: place the burdens of initiating judicial review and of proving that the material is unprotected expression on the censor; require 'prompt judicial review'—a final judicial determination on the merits within a specified, brief period—to prevent the administrative decision of the censor from achieving an effect of finality; and limit the preservation of the status quo for the shortest, fixed period compatible with sound judicial resolution, any restraint imposed in advance of the final judical determination."

The censorship schemes effectuated by the Georgia and other criminal "obscenity" statutes obviously fail to satisfy these procedural requirements. The decision of a librarian to censor the distribution of a given work or film is clearly not reviewable.

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* *Times Film Corp.* v. *City of Chicago*, 365 U. S. 43 (1961); *Bantam Books, Inc.* v. *Sullivan*, 372 U. S. 58 (1963); *Freedman* v. *Maryland*, 380 U. S. 51 (1965); *Lee Art Theatre, Inc.* v. *Virginia*, 392 U. S. 636 (1968); *Blount* v. *Rizzi*, 400 U. S. 410 (1971); *United States* v. *Thirty-Seven Photographs*, 402 U. S. 363 (1971).

The librarian has no obligation to provide notice of his decision or to seek review of that decision, nor would such obligations be reasonable. The librarian also has no economic incentive to provide notice or to seek review; indeed, there are strong economic disincentives.*

As indicated, the publisher and the author will have no way of knowing that they are victims of censorship. Likewise, the individual who is deprived of access to a book or film cannot seek review of the librarian's decision as, in most instances, the person will be unaware of the reason for the non-availability of the work. Therefore, the private censorship decisions compelled by these statutes can be final in effect, despite the fact that this is a decision which private individuals, such as librarians, are ill-equipped to make.**

The Court has declared other censorship schemes unconstitutional due to their inherently inhibiting effect upon protected speech. In *Smith* v. *California, supra,* the censorship scheme was effectuated by a strict liability statute which prohibited the possession of "obscene" materials. The Court stated there:

> "The bookseller's self-censorship, compelled by the State, would be censorship affecting the whole public, hardly less virulent for being privately administered." 361 U. S. at 154.

Likewise, in *Bantam Books, Inc.* v. *Sullivan,* 372 U. S. 58 (1963), the Court declared a statute unconstitutional, on due process grounds, because it established an unofficial censorship board to monitor materials which could potentially be distri-

* Indeed, librarians are concerned that a decision not to acquire a work on the ground that it is "obscene" could be challenged by an author or publisher in that the determination, at least to the extent made by a public library, may constitute state action in violation of their First Amendment rights. Furthermore, a decision could subject a library or librarian to a suit by the author or publisher for trade libel.

** As stated, most librarians do not consider themselves qualified to determine whether a given work is legally "obscene." They receive no professional training which would so qualify them.

buted to minors. The Court emphasized that it is function, not form, which establishes the need for procedural safeguards. *Id.*, 372 U. S. at 67.

A "State is not free to adopt whatever procedures it pleases for dealing with obscenity . . ." *Marcus* v. *Search Warrant*, 367 U. S. 717, 731 (1961). "Rather, the First Amendment requires that procedures be incorporated that 'ensure against the curtailment of constitutionally protected expression . . .'" *Blount* v. *Rizzi, supra*, 400 U. S. at 416 quoting from *Bantam Books, Inc.* v. *Sullivan, supra*, 372 U. S. at 66. The censorship scheme compelled by the Georgia and similar "obscenity" statutes is constitutionally deficient under the Court's own well-established procedural standards. *Blount* v. *Rizzi, supra*. It, therefore, must be declared invalid.

III. NO CRIMINAL PROSECUTION CAN BE PERMITTED UNTIL THERE HAS BEEN A JUDICIAL DETERMINATION IN A CIVIL PROCEEDING THAT THE MATERIAL IS "OBSCENE."

The Court has consistently utilized procedural tools in order to protect against the invasions on protected speech which innately flow from attempts to suppress "obscenity." "Our insistence that regulations of obscenity scrupulously embody the most rigorous procedural safeguards . . . is . . . but a special instance of the larger principle that the freedoms of expression must be ringed about with adequate bulwarks . . ." *Bantam Books, Inc.* v. *Sullivan, supra*, 372 U. S. at 66. The decision of the Georgia Supreme Court must certainly serve to put the Court on notice that procedural safeguards are necessary if incursions on free speech are to be avoided.

Under the Georgia "obscenity" statute, as well as many others, a librarian can be convicted for the distribution of materials which he or she believes in good faith to be constitutionally protected, despite the absence of any prior adversary hearing as to the "obscenity" of the material involved. So long as the

prosecuting officer has obtained the material through simple removal from the library, even a minimal *ex parte* proceeding before a neutral magistrate is unnecessary. *Peachtree News Co.* v. *Slaton*, 226 Ga. 471, 175 S. E. 2d 539 (1970). It is precisely this statutory framework which chills the exercise of First Amendment rights, because, as stated, it places the burden of determining what is or is not "obscene" on the distributor, with the penalty for a wrong guess being imprisonment.

In order to abate the hazards to protected speech presented by the existing vague scheme of mandatory self-censorship, the Court should follow the thrust of its own holdings and declare that no criminal prosecution for the distribution of "obscene" materials can be undertaken until there has been a judicial determination, in an adversary context, with a right of review, that the material is "obscene," and the individual affected has had an opportunity to adjust his conduct.

This Court has already recognized that the most effective procedural tool for protecting First Amendment rights is a judicial determination of the "obscenity" of the materials involved in an adversary proceeding, with a right of prompt review. As stated in *Freedman* v. *Maryland*, *supra*, 380 U. S. at 58:

> "The teaching of our cases is that, because only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint."

Consequently, in *A Quantity of Books* v. *Kansas*, 378 U. S. 205, 210 (1964), the Court held that a seizure of all copies of a given title could not be authorized without a prior adversary hearing "focus[ed] searchingly on the question of obscenity." The Court reasoned that any other procedure would "not adequately safeguard against the suppression of non-obscene books." *Id.*, 378 U. S. at 208.

The threat of criminal prosecution, without any advance determination of the "obscenity" of the material distributed,

clearly presents as serious a threat to constitutionally protected rights as the seizure of all copies of a work in *Kansas*. Furthermore, as already indicated, by establishing a comprehensive censorship scheme, these criminal "obscenity" statutes effectuate a total, *final restraint* on the distribution of materials. Therefore, it is but a logical extension of the law to hold that a judicial determination in an adversary proceeding must take place prior to the commencement of any criminal prosecution.

Indeed, this Court has repeatedly expressed its preference for statutory schemes which provide a civil hearing prior to any criminal prosecution. As the Court recently stated in *Paris Adult Theatre I* v. *Slaton, supra,* 413 U. S. at 55:

> ". . . [S]uch a procedure provides an exhibitor or purveyor of materials the best possible notice, prior to any criminal indictments, as to whether the materials are unprotected by the First Amendment and subject to state regulation."

See also Kingsley Books, Inc. v. *Brown,* 354 U. S. 436, 441-444 (1957); *Freedman* v. *Maryland, supra,* 380 U. S. at 60; and *Blount* v. *Rizzi, supra,* 400 U. S. at 420. The Court should recognize that not only is this scheme the best possible procedure, it is the one that is constitutionally mandated to assure "non-obscene" materials the protection to which they are entitled.

Any argument that such a procedure would too severely hamper the states in their enforcement of the "obscenity" laws must be rejected. As this Court recognized recently in *Roaden* v. *Kentucky,* 413 U. S. 496, 505 (1973), "obscenity" does not present the type of "now or never" criminal situation which requires immediate action without prior judicial evaluation. Furthermore, nothing is to prevent the state from adopting reasonable "time, place, and manner" regulations which may be deemed necessary. *Cox* v. *Louisiana,* 379 U. S. 536, 554-555 (1965).

CONCLUSION

Amicus respectfully submits that the Court should reverse the decision of the Georgia Supreme Court for the reasons set forth above.

Respectfully submitted,

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JAN 25 1974

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Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-557

BILLY JENKINS,

Appellant,

v.

STATE OF GEORGIA,

Appellee.

BRIEF OF AMERICAN BOOKSELLERS ASSOCIATION, INC., NATIONAL ASSOCIATION OF COLLEGE STORES, INC., THE MAGAZINE PUBLISHERS ASSOCIATION, INC. AS *AMICI CURIAE* IN SUPPORT OF APPELLANT'S BRIEF

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Statement

The American Booksellers Association, Inc., The National Association of College Stores, Inc., and the Magazine Publishers Association, Inc. (Collectively referred to herein as "Amici") file this brief in support of appellant's brief, as amici curiae, pursuant to the consent of the District Attorney representing appellee, (Appendix—Exhibit "1") the consent of the appellant (Appendix—Exhibit "2") and the decision of the Supreme Court of the United States (Appendix—Exhibit "3").

The appeal is from the affirmance by the Supreme Court of the State of Georgia of the conviction of Billy Jenkins for exhibiting the motion picture "Carnal Knowledge" in a movie theatre in the City of Albany, Georgia.

Interest of Amici

American Booksellers Association is a trade association organized under the laws of the State of New York. Its regular membership consists of 3,968 booksellers, including large chain operations. It represents the vast majority of large American booksellers and approximately half of all American booksellers, including private book stores, department store book departments and university book stores. Its members range from small stores which sell approximately 1,000 titles per year, to the largest, some of which sell more than 40,000 titles per year.

The National Association of College Stores, Inc. is an association composed of 2,250 stores serving more than seven million college students and faculty. Universities and colleges own 1,700 of these stores.

The Magazine Publishers Association, Inc. is a national trade association, founded in 1919 as a New York corporation, whose membership is composed of more than 134 publishers representing more than 451 magazines and other periodical publications with a combined readership of more than 89% of the adults in the United States.

None of the Amici at any time has had any involvement with the creation, production, distribution or exhibition of the film "Carnal Knowledge". None is in any way connected with the motion picture industry.

The Amici are particularly concerned with the affects the conviction below and the opinion of the Supreme Court of the State of Georgia will have on First and Fourteenth Amendment rights of all persons and most particularly on book and magazine publishers; distributors and vendors.

We are equally concerned with what we consider to be unconstitutional interpretations derived by the Supreme

Court of the State of Georgia from *Miller* v. *California*, — U.S. —— 93 S. Ct. 2607 (1973) and its companion cases.

It is the position of Amici that the Miller guidelines must be clarified or revised in order to remove the cloud of confusion which has descended over the entire area of obscenity legislatively and decisionally since *Miller* and its companion cases were decided on June 21, 1973.[1] If national book and magazine publishers, distributors and vendors can not predict their circulation, printing runs, inventory requirements in each state, and they can not determine advertising rates (magazines), printing schedules, printing runs, inventory projections or many of the other essential business factors which are predicated upon projected circulation or distribution.

This threat presents a clear and present economic danger to the continued existence of many companies within each industry.

In *Miller* the majority opinion stated "the dissenting Justices sounded the alarm of repression . . . these doleful anticipations assume that the Court cannot distinguish commerce in ideas protected by the First Amendment from commercial exploitation of obscene material." Regretably, a trend toward community censorship, book burning, book banning and other forms of official and indirect censorship, has manifested itself in numerous ways since the decision of *Miller* and its companion cases. We have set forth below a number of such incidents occurring throughout the nation, as quoted in newspaper articles:

(a) "Various Groups Attacking Modern School Textbooks.

[1] The essential difference between the majority and minority opinions in the decision below was a disagreement over interpretation of the Miller Guidelines.

. . . "Modern school textbooks are under increasing attack these days . . .

"Mrs. Mel Gabler, of Longview, Tex., who first began protesting textbooks in Texas 13 years ago and has now formed a firm that works nationwide, contends a sociology book proposed by Prentice-Hall, Inc. conditioned young people toward 'barnyard morals.'

"Mrs. Gabler also sharply criticized high school psychology books proposed by Prentice-Hall, Inc. drafting 18 pages of written objections claiming one book encouraged homosexuality. . . .

"The publisher responded to her lengthy objections in one paragraph, saying that Mrs. Gabler's attack on the book was so broad that it would, in effect, protest the entire study of psychology in high schools." [1]

(b) "Dakota town Dumfounded at Criticism of Book Burning by Order of the School Board.

". . .

"At a public school Board meeting last week the books were attacked as being unsuitable for 15-year-old minds. After reading the book in whole or in part the board members unanimously ordered the copies of 'Slaughter House Five' destroyed. According to school superintendent Dale Fuhrman, virtually the only school official who will talk to newsmen 'Deliverance' and an anthology of stories by William Faulkner, Ernest Hemingway and John Steinbeck, which Mr. Severy had

[1] Belleville [Illinois] News-Democrat, 11/2/73.

also assigned were to be investigated and, if found unsuitable, also destroyed." [3]

(c) "Smut Law Even Bans Baby Bottoms.

". . .

"Police Chief Ed Rein said Monday that even baby powder advertisements depicting naked infants probably are illegal under the strict new ordinance passed unanimously by the City Council [New Baltimore] on October 23.

"'I believe they show baby buttocks he said with a grin.'

"Buttocks are among the things which the new law specifically identifies as offensive. . . ." [4]

(d) "Teacher Charged with Obscenity."

"The ambiguity feared by detractors of the recent Supreme Court ruling on obscenity became easily apparent in a McBee, South Carolina, lawsuit where a school teacher is being charged with distributing obscene materials to minors for giving a study assignment of a book which was on the school's approved list.

"The sheriff's office said some people in the rural community of less than 1,000 appeared upset by some language in the book 'Slaughter House Five' which deals with the horrors of war and the Allied's fire bombing of Dresden during World War II. . . ." [5]

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[3] New York Times, 11/16/73.

[4] Detroit Free Press, 11/6/73.

[5] Dunn, North Carolina Record, 10/29/73.

(e) Strongville book ban decried, defended.

"Lawyers for the Strongville Board of Education told U.S. District Court last week that only the board has the right to determine what books are used in the schools and any attempt to take away that right would be unconstitutional.

" . . .

"The board had banned high school use of 'Catch 22' by Joseph Heller and 'Cat's Cradle' and 'God Bless You, Mr. Rosewater' by Kurt Vonnegut, Jr. . . ." [6]

(f) "U.S. classic expurgated, school sued.

"Some students of suburban Hilliard Junior High School objected when a book of poems they bought directly from the school for $1.25 had 4 pages missing.

"After pupils were told that their two English teachers and the principal had found the pages offensive and removed them, a suit was filed in U.S. District Court here.

" . . .

"Principal Harry P. Smith said the two teachers . . . objected to analyzing four poems in Edgar Lee Master's 1915 Spoon River Anthology.

" . . .

"The poems use the words 'harlot', 'bare breast', 'free love' and 'lesbian'." [7]

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[6] Cleveland Plain Dealer, 11/4/73.

[7] Philadelphia Inquirer, 9/26/73 (Reporting Columbus, Ohio, Press Release).

(g) "Blind Man Helps Censor Rockland County Films.

"West Nyack, N.Y. Oct. 7, Several weeks ago the Town of Clarkston, in Rockland County, established a nine-member 'Obscenity Committee' to screen movies, cabaret acts and printed matter.

"A few weeks ago it selected Harry Snyder, a blind 60-year-old retired restaurateur and business man to head the committee. . . ."[8]

(h) "Flowers for Algernon Called 'Immoral.'

"Several parents of students at Elizabethtown Area High School have expressed concern about what they believe to be 'immoral' passages in a novel currently being read in a junior English class.

"The book is Daniel Keyes' 'Flowers for Algernon,' a . . . best-seller which has been televised and which was made into a film called 'Charly' several years ago.

"At least one of the concerned parents . . . has asked the school district to remove the book from the curriculum and from the shelves of the school library.

" . . .

"Board Vice President J. Samuel Parrett said he had received several telephone calls denouncing the use of 'Flowers of Algernon' and noted that he questioned the use of this type of literature in English classes.

" 'There's so much of this obscene material available that we don't have to give it to children in the schools,' he explained Tuesday. . . ."[9]

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[8] New York Times, 11/22/73.

[9] Lancaster, Pa. New Era, 10/17/73.

(i) "Henrico Library Suspends 5 Books.

"Five books, including one that is required reading for many high school students, have been removed from the shelves of all five branches of the Henrico Public Library while they are being reviewed by the library system's committee that considers controversial books.

" . . .

"The five books that have been removed for review are 'Catcher in the Rye' by J.D. Salinger, 'Summer of '42' by Herman Raucher, 'Deliverance' by James Dickey, 'A Clockwork Orange' by Anthony Burgess, and a child's book 'Story Number Three' by Eugene Ionesco, with illustrations by Phillippe Corentin.

" . . .

"Any patron who has an objection about a book on the shelves can fill out a citizen's request for reconsideration of the book, stating objections and the review is launched. . . ." [10]

(j) "U.S. Funds Anti-Smut Drive.

"A Lutheran college in California is receiving $137,625 in federal funds to assist prosecutors across the country in a crack-down against obscene films and literature.

"The project offers suggested 'trial tactics', provides model pleadings and court orders and even supplies expert witnesses to testify against de-

[10] Richmond, Virginia, Times Dispatch, 10/1/73.

fendants. The next proposal is to send briefs for anti-pornography arguments to selected judges.

". . .

"The federally funded project . . . was begun on the recommendation of a Jesuit priest, the Rev. Morton A. Hill, who helped write a scathing dissenting opinion in the 1970 report of the President's Commission on Obscenity and Pornography." [11]

(k) "Book Burning Protested.

"Eight Members of the Girl Scout human-relations Committee here protested the burning of a Scout booklet 'Commitment! Community Action.'

"The 79-page publication listed program ideas suggested for high school age Girl Scouts. Some of the suggested programs were in controversial areas—sex education, birth control and womens liberation.

"The Totem Girl Scout Council board voted last week to end support of the booklet as well as destroy remaining 'supply copies.'

"Dissenting committee members said yesterday in a letter to the board:

'The act of "book burning" of material printed at council expense and authorized for distribution by the board . . . only four months ago . . . is not an act which manifests the democratic way of life. We strongly protest this action.

". . ." [12]

[11] Washington Post, 8/29/73.

[12] Seattle Washington Times, 7/21/73.

(l) " 'Vulgar' book to get study.

"Two committees of the Bibb Board of Education got their 'homework' assignments Monday—to read 'Manchild in the Promised Land' a book a parent has complained is vulgar.

". . .

"Written by Claude Brown, the book recounts the experiences of a young black man growing up in Harlem.

"Board member Mrs. Delores Cook said parents have a right to object to any material. 'If parents want to object to Mother Goose, fine. I have heard of some pretty Freudian explanations for Mother Goose', she said." [13]

(m) "Sheriff cracks down on nudes.

"Longwood, Fla., (AP)—The Longwood police chief has declared bare skin a sin when reviewed between the covers of magazines.

" 'That type of nudity takes away from the meaning of marriage and the family.' It is a sin said Chief Wesley Dowell in announcing a crack down on sale of Playboy, Penthouse and similar magazines.

"Claiming authority to interpret obscenity under a 1968 city ordinance forbidding sale or exhibition of pornography, the Chief said the sale of such publications will be a misdemeanor.

"Dowell said he had not contacted the city council . . . and was leaning on a recent U.S. Supreme

[13] Macon, Ga., Telegraph, 7/17/73.

Court decision giving communities the authority to define obscenity.

"'If a nude body appears, I'm against it. I am just as concerned about male nudity. I am not just picking on the ladies, he added." [14]

The foregoing illustrations have been accumulated only after minimal research and have been culled only from the files of major daily newspapers throughout the nation. We respectfully submit that the illustrations cited represent only a small fraction of examples of book burning, banning, and censorship.

The "Alarm of Repression" has validly been sounded.

ARGUMENT

POINT I

The Miller standards for determining obscenity are not clear, resulting in First Amendment and Due Process violations of appellant's rights.

The heart of *Miller* v. *California*, —— U.S. ——, 93 S.Ct. 2607 (1973) is its statement of guidelines:

"The basic guidelines for the trier of fact must be:

(a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest,

(b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value." (citations omitted).

[14] Longwood, Fla. (AP), Coon Rapids, Iowa, News 12/9/73.

We believe such guidelines to be unclear for the reasons set forth below.

(a) ***The boundaries of the "community" which sets the standards for determining prurient appeal may not vary from locality to locality within a State.***

1. Due Process.

An essential ingredient in the Opinion of the Supreme Court of Georgia was that "The *Miller* case, supra, further held that juries can consider State or local community standards in lieu of 'national standards . . . ." Such an interpretation would appear to be incorrect and in violation of the Fourteenth Amendment which prohibits State sanction of infringements on liberty without due process of law.

The source of this disturbing interpretation by the Court below can be traced to a dictum in *Miller*, which reads:

> "It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept depiction of conduct found tolerable in Las Vegas, or New York City." (*Miller* v. *California*, —— U.S., at—93 S.Ct. at 2619).

In isolation, such dictum is susceptible of the interpretation derived by the majority of the court below. When read in the light of the standards so painstakingly set forth in *Miller* to determine "the basic guidelines", the dictum must be viewed only as an illustration in support of the proposition that the tolerance level for works appealing to prurient interest varies from locality to locality. Certainly no one could quarrel with that proposition. One could as readily postulate that the tolerance level for

obscenity in a blue collar neighborhood of one-family homes in the County of Queens would be far lower than in the Greenwich Village section of New York County, both located within the City of New York.

It is precisely the probability of such variations which makes city-wide, county-wide, town-wide, or village-wide standards unascertainable and therefore unconstitutional. When the concept of "community" standards which determine criminality becomes so difficult to ascertain that publishers, authors, book and magazine vendors, and motion picture producers, distributors and exhibitors must necessarily guess at its meaning and differ as to its applications, any legislation relying upon such concept must of necessity run afoul of the Fourteenth Amendment protection against infringement of liberty without due process of law. *Connaly* v. *General Construction Co.*, 269 U.S. 385, 391 (1926). The opinion of the Georgia Supreme Court, which made no attempt to ascertain whether "local" means county, city, neighborhood, or whatever, only exacerbated the difficulty of constitutionally applying "local" standards.

2. First Amendment.

When a conviction, based on violation of an obscenity statute is obtained by applying "local" standards, particularly after such conviction is affirmed by a state appellate court, that conviction effectively imposes a form of self-censorship on all other potential publishers, distributors, vendors or exhibitors within the state of conviction. How many crusading publishers, distributors, vendors or exhibitors can we expect to find ready to face criminal conviction by publishing, distributing, vending or exhibiting a work held to be obscene, after learning of a judicial determination in a different locality in the state which threatens just such repercussions. In such event the self-censorship, compelled by state law, would be a censorship

affecting the whole public, hardly less virulent for being privately administered. Through it, the distribution of works, both obscene and not obscene, depending upon the "local" standard to be applied, would unconstitutionally be impeded. Cf. *Smith* v. *California*, 361 U.S. 147 (1959).

The leading lower court decision on the applicability of community standards in obscenity cases, *In re Giannini*, 69 Cal.2d 563, 72 Cal. Rptr. 655, 446 P.2d 535 (1969) cert. denied 395 U.S. 910 (1969), concluded that

> "... on balance a community comprised of the entire State of California is the more appropriate. This standard avoids administrative problems in determining the exact scope of the smaller community; whether it should be city, county, individual neighborhood within a city, or whatever. Moreover, a strong policy favors uniformity in application of state criminal law [citation omitted]; we promote this policy by assuring that application of the obscenity law in this state will be based on a uniform 'community'."

The effect of the application of "community" standards, as applied by the court below, would make for uncertainty, unpredictability and economic chaos for national publishers, distributors and booksellers so as to have a chilling effect on the publication and sale of magazines and books which even border on the controversial.

(b) ***The Miller guideline that a work must depict or describe patently offensive sexual conduct in order to fall beyond the scope of First Amendment protection should be limited to "hard core" pornography.***

1. Due Process.

This court has long held that scienter is a prerequisite to a finding of criminal violation of obscenity legislation.

Smith v. *California*, 361 U.S. 147 (1959). However, careful reflection will confirm that scienter in obscenity cases involves more than knowledge of the contents of the allegedly offending work. Of necessity it also involves a value judgment. The instant case is an illustration in point.

When seven distinguished judges of the highest court of the State of Georgia can divide 4 to 3 as to whether "Carnal Knowledge" was obscene, when the movie can be widely acclaimed[15] and named one of the ten best motion pictures of the year by many distinguished newspapers,[16] there is obviously reason to be concerned as to whether "Carnal Knowledge" described, "in a patently offensive way, sexual conduct specifically defined by the applicable state law . . ." Certainly the appellant had no way of knowing this in advance of his conviction. This is the crux of the case.

Unless the material is so blatantly hard core pornography that reasonable men could not differ as to its characterization, to sanction the conviction of a publisher, distributor, vendor or exhibitor would be to pay mere lip service to a defendant's rights to due process. Cf. *Connaly* v. *General Construction Co.*, 269 U.S. 385, 391 (1926); *Lanzetta* v. *New Jersey*, 306 U.S. 451, 453 (1939).

2. First Amendment.

This case crystalizes the danger that publishers, distributors and vendors of books and magazines and producers, distributors and exhibitors of motion pictures may

---

[15] See the reviews cited the Justice Gunter's dissent and Saturday Review (Hollis Alpert); July 3, 1971, p. 18.

[16] Including The Oakland Tribune (Robert Dyler); The New York Times (Vincent Canby); The Nashville Tenesseean (Harry Horn); The Cleveland Plain Dealer (Emerson Batdorff); The Houston Chronicle (Jeff Millar); The Denver Post (Barry Oromison).

impose censorship upon themselves rather than risk a guess as to the application of the "patently offensive sexual conduct" test to a work which describes sexual conduct but is not hard core pornography.

Materials which describe blatantly "hard core pornography" present the least difficulty. Publishers, producers, distributors, vendors and exhibitors will suffer their greatest doubts with respect to those works which have both artistic and social merit and prurient interest appeal. If the dissemination of such works exposes the disseminators to criminal prosecution the spector of self-censorship of major works looms ahead frighteningly. The recent flurry of book banning and book burnings may be only a harbinger of the dangers still to be encountered. As Chief Justice Warren pointed out, "The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." *United States* v. *Hariss*, 347 U.S. 612, 617 (1954). This court has frequently emphasized that "stricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser." *Smith* v. *California*, 361 U.S. 147, 151 (1959); cf. *Roth* v. *United States*, 354 U.S. 476, 491—492 (1957); See *Rabe* v. *Washington*, 405 U.S. 313 (1972); *Interstate Circuit, Inc.* v. *Dallas*, 390 U.S. 676 (1968); *Winters* v. *New York*, 333 U.S. 507 (1948). We respectfully submit, in the light of the "Carnal Knowledge" decision of the Court below, that the *Miller* guidelines have already had such an inhibiting affect.

Parenthetically, it should be noted that state intrusions on First Amendment rights have been severely limited by this court in press freedom areas in connection with rights otherwise protected by state libel[17] and right of privacy laws.[18]

(c) ***In determining whether a work, "taken as a whole, lacks serious literary, artistic, political or scientific value", a national standard must apply.***

If the concept of "serious literary, artistic, political, or scientific value" is to have meaning, such concept must be determined by a national as opposed to a "community" standards. When dealing with a concept of morality (e.g., obscenity), which by definition is determined by the mores of a particular "community" at a particular time, it may be appropriate to consider only the mores of that community at that time in making such a morality judgment.

However, in determining whether a controversial work has literary, artistic, political or scientific merit, it is inconceivable that such determination be left to the judgment of a "local" community unless we are prepared to turn the clock back to the era of the Scopes trial and place the

---

[17] *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964). *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130 (1967) and *Rosenbloom* v. *Metromedia*, 403 U.S. 29 (1971), firmly established the principle that constitutional protections for speech and press limit a state's power to award damages in a libel action brought by a public official, or public figure or any other person involved in matters of public interest, against critics of such public or non-public figures to cases involving 'actual malice.'

[18] *Time, Inc.* v. *Hill*, 385 U.S. 374 (1967), adhering to the principle established in *New York Times Co.* v. *Sullivan*, supra, held "that the constitutional protection of speech and press preclude the application of the New York statute [Section 51 of the New York Civil Rights Law dealing with right of privacy] to redress false reports of matters of public interest in the absence of proof that the defendant published the report with knowledge of its falsity or in reckless disregard of the truth."

power of determining whether a work has serious value and whether it may or may not be read, or taught, or seen, in the hands of a jury which may have inadequate training or background for making such a determination.

As noted above, "Carnal Knowledge" was widely acclaimed and received many favorable and even glowing reviews throughout the nation. If this court is to allow the serious nature of a book, or movie or periodical to be judged separately in every village, hamlet, town, county, city and state in the nation, the immediate result will be self-censorship and the sharp curtailment of books, magazines and motion pictures which treat sex in a manner which even borders on the controversial. The end result can only be a dramatic skrinkage of First Amendment protection. Neither publishers, nor producers, nor distributors, nor exhibitors, nor booksellers (some of which are chains of stores located throughout the nation), will find it economically feasible to publish, order, sell, exhibit or maintain inventories of such controversial works. Magazine publishers would find it impossible to guarantee minimum circulation, a prerequisite to fixing advertising rates. Such results would hardly be consistent with the declaration in *Miller* that

> "The First Amendment protects works which, taken as a whole, have serious literary, artistic, political or scientific value, regardless of whether the government or a majority of the people approve of the ideas the works represent. The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." (—— U. S., at ——, 93 S.Ct., at 2620-21).

(d) ***A prior civil determination of obscenity is the minimum pre-requisite to meeting due process requirements.***

The Due Process clause of the Fourteenth Amendment requires that all criminal laws provide fair notice of "what the state commands or forbids." *Lanzetta* v. *New Jersey*, 306 U.S. 451, 453 (1939); *Connaly* v. *General Construction Co.*, 269 U.S. 385 (1926). The almost unavoidable vagueness of any standards in the obscenity area makes "fair notice" an impossibility with respect to any works with the possible exception of those involving blatantly hard core pornography and we have doubt even as to that exception. Nevertheless, this court has steadily maintained its position that the definition of obscenity must provide adequate notice of exactly what is prohibited from dissemination. *Rabe* v. *Washington*, 405 U.S. 313 (1972); *Interstate Circuit, Inc.* v. *Dallas*, 390 U.S. 676 (1968); *Winters* v. *New York*, 333 U.S. 507 (1948); *Paris Adult Theatre I*, v. *Slaton*, —— U.S. ——, (71-1051 June 21, 1973, Brennan J., dissenting). Yet, with all due respect to this court, no standards have been established which cast doubt on Mr. Justice Black's assertion that "no person, not even the most learned judge, much less a layman, is capable of knowing in advance of an ultimate decision of his particular case by this Court whether certain material comes within the area of obscenity . . . ." *Ginzburg* v. *United States*, 383 U.S., at 480-481 (dissenting opinion).

Therefore, we respectfully refer this Court to its own allusion to a possible remedy, contained in footnote 4 of the majority opinion in *Slaton, supra*, that,

> "This procedure would have even more merit if the exhibitor or purveyor could also test the issue of obscenity in a similar civil action prior to any exposure to criminal penalty. . . ." (—— U.S. ——, 93 S.Ct., at 2634.

Such a remedy was strongly recommended by The Commission on Obscenity and Pornography after it had concluded:

> "The criminal process should not ordinarily be invoked against persons who might have reasonably believed, in good faith, that the books or films they distributed were entitled to constitutional protection, for any threat of criminal sanctions might otherwise deter the free distribution of constitutionally protected material." Report of The Commission on Obscenity and Pornography (1970).

Perhaps Mr. Justice Douglas set forth the proposition most succinctly in his dissent in *Miller*, when he stated:

> "If a specific book, play, paper or motion picture has in a civil proceeding been condemned as obscene and a review of that finding has been completed, and thereafter a person publishes, shows or displays that particular book or film, then a vague law has been made specific. There would remain the underlying question whether the First Amendment allows an implied exception in the case of obscenity. I do not think it does and my views on the issue have been stated over and over again. But at least a criminal prosecution brought at that juncture would not violate the time honored void-for vagueness test."
>
> ". . . To send men to jail for violating standards they cannot understand, construe and apply is a monstrous thing to do in a nation dedicated to fair trials and due process." (—— U.S. ——, 93 S.Ct., at 2624-25).

We respectfully submit, in the face of inevitable ambiguities in the interpretation of any obscenity statute, that only a requirement of prior civil determination will avoid

the pitfalls of the "void for vagueness doctrine" which Mr. Justice Brennan appears to have concluded is a bar to any constitutionally valid conviction under an existing obscenity statute. *Paris Adult Theatre I* v. *Slaton*, — U.S. —, 93 S.Ct. 2628, n.9 (1973).

POINT II

A legislative body may make no law abridging freedom of speech or the press in the absence of a clear showing of danger to the public health, safety or welfare.

Since the Fourteenth Amendment makes First Amendment legislative restrictions equally applicable to state and federal legislatures, this Court should be wary of carving out an obscenity exception with respect to that part of our Constitution which is the foundation stone of the republic. We respectfully submit that any publication, play or movie, access to which is restricted to consenting adults, is protected by the First Amendment.

Amici write no brief for the benefit of smut peddlers or porno movie producers. We have no sympathy for those who would profit by preying on individuals attracted to depictions of sexual sadism, masochism, fetishes, or other perverted sexual practices. But how dare we make exceptions to First Amendment guarantees of Free Speech and Press unless it can be proven that the danger incurred by permitting such freedom is greater than the danger to which we are exposed by sanctioning its abridgement.

Free speech and press are certainly subject to restrictions in proper circumstances. Mr. Justice Holmes' "fire in a crowded theatre" aphorism illustrated the point well. It is axiomatic that the right of a prankster to cry "fire" in a theatre is outweighed by the rights of the theatre

occupants to their lives and safety. But unless and until it can be demonstrated that obscenity, when purveyed or exhibited to consenting adults, exposes the public to a greater danger than an obscenity exception to the rights of free speech and free press, we respectfully submit that this Court must resist any efforts to intrude upon such First Amendment rights which continue to insure the orderly social and political changes without which our republic could not have long endured.

The majority opinion of *Slaton, supra,* footnote 8, makes reference to the Hill-Link Minority Report of the Commission on Obscenity and Pornography which suggests "that there is at least an arguable correlation between obscene material and crime." It fails, however, to quote the primary conclusion of the majority report, concurred in by twelve members of the Commission, to the effect that,

> "Federal, state and local legislation prohibiting the sale, exhibition and distribution of sexual materials to consenting adults should be repealed. . . ."

and further to the effect that:

> "Empirical investigation thus supports the opinion of a substantial majority of persons professionally engaged in the treatment of deviancy, delinquency and anti-social behavior, that exposure to sexually explicit materials has no harmful causal role in these areas." The Report of The Commission on Obscenity and Pornography (1970 ed.), 57-61.

Only five commissioners dissented and one abstained.

Thus, taking into account the dangers implicit in carving out an obscenity exception to the First Amendment, the near impossibility of avoiding "void for vagueness" pit-

falls of any obscenity statute, and the lack of convincing evidence that the danger of permitting freedom to disseminate obscenity to consenting adults is greater than the dangers inherent in its abridgment, we respectfully request this Court to reconsider its decision in *Miller* and to overrule it.

CONCLUSION

Amici respectfully request that the conviction of appellant should be reversed and that this Court should reassess its holdings in *Miller* and its companion cases, paying particular attention to the need for a prior civil determination of obscenity before any defendant may legally be tried for the commission of a crime.

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New York, New York 10016

NEWMAN, RICH, KRINSLY, POSES,
KATZ, LILLIENSTEIN, Esqs.
Of Counsel

FULTON COUNTY

LEWIS R. SLATON
DISTRICT ATTORNEY-ATLANTA JUDICIAL CIRCUIT
THIRD FLOOR COURTHOUSE • ATLANTA, GEORGIA 30303

January 7, 1974

Mr. Michael Rodak
Clerk, U.S. Supreme Court
Office of the Clerk
Supreme Court Building
Washington, D.C. 20543

Re: Jenkins v. State
Number 73-557
Supreme Court of the
United States

Dear Mr. Rodak:

We are receiving requests under Rule 42(2) of the Court for consent to the filing of briefs amicus curiae by counsel for several groups.

Please file this letter to show that the State of Georgia consents to the filing of such briefs on behalf of any interested group or party.

Yours very truly,

Carter Goode

CG/dj

CC: Mr. Tench C. Coxe
Attorney at Law
1500 Candler Building
Atlanta, Georgia 30303

Exhibit "1"

(Letter of Carter Goode consenting to filing of brief *amicus curiae*)

Exhibit "2"

(Letter of consent of Tench C. Coxe consenting to filing of brief *amicus curiae*)

(See Opposite) ☞

January 11, 1974

Troutman, Sanders, Lockerman & Ashmore, Esqs.
1500 Candelar bldg.
Atlanta, Georgia 03303

Attention: Messrs. Coke and Schroder,

re: Billie Jenkins v. State of Georgia
Supreme Court of the United States
No. 73-557

Gentlemen:

We represent American Booksellers Association, Inc. which has been granted the right to prepare a brief as amicus curiae in support of the appellant's position in the above matter.

Due to the question of a possible conflict of interest, the attorneys formerly representing the American Booksellers Association, Inc. in this appeal, are no longer in a position to do so.

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Due to the question of a possible conflict of interest, the attorneys formerly representing the American Booksellers Association, Inc. in this appeal, are no longer in a position to do so. We would appreciate it if you would indicate your consent to our appearance in behalf of American Booksellers Association, Inc. for the purpose of submitting a brief as amicus curiae in support of appellant's appeal from the affirmants of the Supreme Court of the State of Georgia of the conviction of Billie Jenkins, for exhibiting the motion picture "Carnal Knowledge" in the City of Albany, Georgia.

You may, if you wish, indicate your consent by signing the enclosed copy of this letter where indicated and returning same in the enclosed envelope.

We would greatly appreciate your prompt attention to this matter.

Yours truly,

NEWMAN, RICH, KRINSLY, POSES, KATZ
& LILLIENSTEIN

By: _____
Maxwell J. Lillienstein

MJL:RK
ENC.

CONSENTED TO:
TROUTMAN, SANDERS, LOCKERMAN & ASHMORE
By: Linda C. Coke

Exhibit "3"

(Letter of Clerk of Supreme Court reporting consent to filing briefs by *amici curiae*)

(See Opposite) ☞

OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

December 10, 1973

James Bouras, Esq.
522 Fifth Avenue
New York, New York 10036

RE: JENKINS v. GEORGIA, No. 73-557

Dear Mr. Bouras:

The Court today took the following action in the above case:

"The motion of the Authors League of America, Inc., for leave to file a brief, as amicus curiae, is granted.

"The motion of the National Association of Theatre Owners for leave to file a brief, as amicus curiae, is granted.

The motion of Association of American Publishers, Inc., et al., for leave to file a brief, as amici

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The motion of Association of American Publishers, Inc., et al., for leave to file a brief, as amici curiae, is granted.

"In this case probable jurisdiction is noted."

Enclosed are memorandums describing the time requirements and procedures under the Rules.

The additional docketing fee of $50.00, Rule 52(a), is due and payable.

Very truly yours,

MICHAEL RODAK, JR., Clerk
By

(Mrs.) Helen K. Loughran
Assistant Clerk

Enclosures
cc: Carter Goode, Esq.

(Submitted with the Consent of the Parties)

JAN 24 1974

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-857

BILLY JENKINS,

Appellant,

v.

STATE OF GEORGIA,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF GEORGIA

BRIEF OF THE AUTHORS LEAGUE OF AMERICA, INC. AS *AMICUS CURIAE*

IRWIN KARP

Attorney for The Authors League of America, Inc. as Amicus Curiae

234 W. 44th Street

New York, N.Y. 10036

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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-557

BILLY JENKINS,

Appellant,

v.

STATE OF GEORGIA,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF GEORGIA

BRIEF OF THE AUTHORS LEAGUE OF AMERICA, INC. AS *AMICUS CURIAE*

Interest of The Authors League

The Authors League is a national society of professional writers and dramatists. Several of them write screenplays; and many books and plays by its members are adapted for motion pictures. One of the League's principal purposes is to express the views of its members in cases involving freedom of speech and press, and the freedoms to read books and view plays and films. The decision of the Supreme Court of Georgia drastically curtails these freedoms, and restricts the constitutional rights of authors, screenwriters, directors and film producers.

Summary of Argument

I. CARNAL KNOWLEDGE is not obscene because it is a work of serious literary and artistic value. Its recognition by professional critics as a genuine effort at literary and artistic expression establishes that value. Serious literary or artistic value cannot be negated by "community standards", the votes of jurors, or the personal tastes of judges.

II. No criminal prosecution for obscenity should be permitted unless a work has previously been adjudicated obscene in a civil, adversary proceeding. Prior civil judicial determinations of obscenity are necessary to prevent self-censorship by theatre owners, booksellers and librarians, born of uncertainty and fear or threat of criminal prosecution. Requiring prior civil determinations would not protect those who distribute hardcore pornography surreptitiously or for brief periods. Motion Picture Association "ratings" should not be applied in obscenity cases.

III. Any work that is not pruriently appealing or patently offensive under a state's "community standard" cannot be held obscene by applying local community standards. If local standards were held to prevail, a non-obscene film or book, acceptable under the state standard, nevertheless could be prosecuted repeatedly under differing local standards. The state-wide standard need not prevent the dissemination of certain works in communities where they are accepted.

Preliminary Statement

We agree with Appellant that Sec. 26.2105 (Ga. Code Ann.), prohibiting films that contain acts of "public indecency", is unconstitutional; and that he was denied due process, *inter alia*, by the failure to charge him with two offenses on which his conviction may have rested. We do not argue these points.

Nor do we argue the Authors League's fundamental position on obscenity and the First Amendment, which it has advocated to the Court in prior *amicus curiae* briefs beginning with *Roth* v. *United States*, 354 U.S. 476 (1957), and which it still maintains is required to give adequate protection under the First Amendment. That position is the one adopted by Justices Brennan, Stewart and Marshall in *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49, 112, 113. We do, however, note its application to the issue posed by this appeal. If a theatre owner had any doubts about a film's status under a statute protecting juveniles, he would prevent them from entering the theatre (as is now done). If he had any doubts about a film's status under a "thrusting" statute, he would avoid advertising or displays that might intrude offensive materials on unwilling adults. But he could not be prevented, by threats of prosecution (or self-censorship born of uncertainty), from exhibiting films of literary and artistic value to adults who chose to see them—for the exhibition of a film, "obscene" or not, to adults willing to see it could never be prosecuted as a crime.

POINT I

As a Work of Serious Literary and Artistic Value (and, therefore, of Redeeming Social Value) CARNAL KNOWLEDGE Cannot be Held Obscene.

(i) Serious Literary or Artistic Value Cannot be Judged by "Community Standards"

CARNAL KNOWLEDGE does not appeal to prurient interest and is not patently offensive in depicting sexual conduct. But the rights of adults to see the film in Albany, Georgia do not depend on whether it passes these tests of the *Miller* standard. (*Miller* v. *California*, 413 U.S. 15 [1973]) CARNAL KNOWLEDGE is entitled to First Amendment protection in Albany and throughout the United States under the third *Miller* test—i.e. because it is a work of serious literary and artistic value. It therefore satisfies the "minimum" which entitles even prurient, patently offensive works to "merit First Amendment protection" under *Miller*; and it therefore has "redeeming social value" under the Georgia statute. So long as restraints may be imposed on the dissemination of allegedly "obscene" books or films to willing adults, the serious value test is essential as a separate safeguard for the First Amendment rights of authors, film producers, distributors and adults who choose to read or view a book or film. For as Justice Harlan noted, even among the "masterpieces" there are works that may be judged pruriently appealing (*Manuel Enterprises* v. *Day*, 370 U.S. 478, 487) and patently offensive.

Under *Miller*, the serious literary or artistic value of a book or film cannot be negated by state or local "community standards." Moreover, such values have never depended on approval by a majority, which is what the "consensus"

of a community standard reflects. Majorities, per se, are not qualified to judge the literary or artistic value of books; for example, 58% of the adults queried in a 1969 Gallup poll said "they had never read a book from cover to cover . . ." (PUBLISHERS WEEKLY, June 2, 1969, p. 59).

The motion picture is an art form no less sophisticated than literature, the stage or painting. Twelve jurors bring no greater expertise to CARNAL KNOWLEDGE than they would to ULYSSES, WAITING FOR GODOT or LES DESMOISELLES D'AVIGNON. Under the First Amendment these works would have serious literary value in Maine, Mississippi or Georgia even though juries in Bangor, Biloxi or Albany voted to the contrary.

(ii) Serious Literary or Artistic Value, Recognized by Professional Critics, Cannot be Negated by Judges' Personal Tastes

Judges who never read ULYSSES or found it "hard to believe" the book "possesses literary importance"*, nevertheless would accept it as a work of serious literary and artistic value. Despite their contrary personal tastes, they would concede that Joyce's novel or LADY CHATTERLY'S LOVER have such values because professional critics, while differing in their evaluations, recognize these books as genuine—"serious"**—literary or artistic "expressions" which cannot be dismissed as hardcore pornography seeking redemption with "a quotation from Voltaire in the flyleaf . . ." (413 U.S. at p. 25).

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* From a review by the Springfield REPUBLICAN, quoted in BOOK REVIEW DIGEST (H. W. Wilson Company, 1934).

** Obviously "serious" connotes some discernable quantum of literary or artistic value, rather than a dictate that the work must be sober rather than comic, or didactic rather than entertaining. GARGANTUA AND PANTAGRUEL is "a comic and satirical masterpiece." Encyclopedia Britannica, 1971; Vol. 18, p. 970); as such, it has "serious" literary and artistic value under *Miller*.

CARNAL KNOWLEDGE is a work of serious literary and artistic value:

> "Not only is the film, overall, the best acted in years; it is also the most mature of all those American films that have attempted to deal with the subject of sex in these ultra-liberated cinematic times." SATURDAY REVIEW (Hollis Alpert); July 3, 1971, p. 18.
>
> "Obviously, the film is not for everyone, but it struck me as Nichols' most controlled piece of direction, bringing a mature perspective to a funny, bitter deeply probing examination of immature behavior." AMERICA ("Published by Jesuits of the United States and Canada") July, 1971, p. 48.

These are two of the fourteen national magazine reviews of CARNAL KNOWLEDGE indexed by READERS GUIDE TO PERIODICAL LITERATURE for March 1971-February 1972 (p. 764) Some critics agreed with Mr. Alpert's highly favorable judgment; the film appeared on the "10 Best Films" lists of several reviewers. Other reviewers were less favorably impressed; Paul D. Zimmerman's review in NEWSWEEK concludes "what might have been a great film survives simply as a very good one." July 5, 1971; p. 71. What is significant is that all of the reviewers considered, and evaluated, CARNAL KNOWLEDGE as a film of serious literary and artistic value. They considered it a genuine effort at literary and artistic expression, regardless of their differing evaluations of its success in realizing its aesthetic objectives. These reviews, and others in newspapers across the country, reflect Judge Hawes' view that "Certainly (CARNAL KNOWLEDGE) is not the kind of hard-core pornography we removed from public consumption in *Slaton* v. *Paris Adult Theater I.*"

We do not contend that professional critics are infallible arbiters of literary or artistic value. Sometimes they have failed to perceive these values in works whose merits were later widely hailed. And we do not believe that any work should be convicted of obscenity on the basis of critics' reviews. But there is a strong presumption in favor of First Amendment protection for books, films and other works. Consequently, when recognized, professional critics—in their reviews—consider that a film or book is a genuine work of literary or artistic expression then, we submit, it has sufficient "value" to entitle it to First Amendment protection under the third Miller guideline (and therefore, under Georgia's "redeeming social value" test). We believe that the reviews of even a minority of such critics are sufficient to establish that value under *Miller*, and are competent evidence of their evaluations. *Mattox* v. *News Syndicate*, 176 F.2d 987, 903; cert. den. 338 U.S. 858.

Although the Supreme Court of Georgia viewed the film in order to make an "independent constitutional judgment on the facts" (*Jacobellis* v. *Ohio*, 378 U.S. 184, 190) it ignored the opinions of professional critics for well known national magazines and major newspapers. Rather, the four majority judges substituted their personal tastes and subjective judgments for these independent, professional appraisals, on the critical issue of "value". The four judges utterly failed to explain their conclusion that CARNAL KNOWLEDGE lacked serious literary or artistic value. Nor did the four explain how their three dissenting colleagues erred in concluding that the film possessed such value under *Miller*. Had the jurors divided in that proportion on this constitutional judgment of the facts, there would not have been a conviction.

POINT II

A Prior Civil Determination of Obscenity Must be Required to Prevent Censorship by Uncertainty.

(i) Censorship by Uncertainty

Billy Jenkins was convicted and sentenced for making the same judgment reached by 3 judges—43%—of Georgia's highest court. He thought, CARNAL KNOWLEDGE was not "obscene". But his failure to correctly predict how a jury (and a bare majority of the state's Supreme Court) would evaluate the film, and its literary and artistic values, subjected him to serious penalties. His fate carries a chilling message to theatre owners throughout the country. Moreover, no Georgia exhibitor could determine from the majority opinion what specific elements of CARNAL KNOWLEDGE led judges to the astounding conclusion it was prurient, patently offensive or—most amazing—lacked serious literary or artistic value. Thus, no theatre owner could determine whether the next film challenged by prosecutors or police would bring him to the same fate.*

Most theatre owners, like librarians and booksellers, cannot risk predicting whether controversial films (or books) will be ruled obscene in crimnial proceedings commenced after they have exhibited (or distributed) such works. Aside from the danger of jail or fines, they "are naturally reluctant to incur the risk of *criminal prosecution* since that entails adverse publicity and physical and mental

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* Just as no bookseller or librarian could determine, from the welter of conflicting opinion on TROPIC OF CANCER by often-divided state courts, whether the next controversial book (e.g. FANNY HILL) would be ruled "obscene"; an uncertainty compounded by the fact that some courts which ruled TROPIC obscene held FANNY HILL was not, while others shifted in the opposite direction.

strain" regardless of the outcome; nor can they afford the heavy financial costs of a prosecution or appeal, which they must pay even though they prevail. (emphasis added) *Bunis* v. *Conway*, 17 A.D.2d 207, 210; see also, *Bantam Books* v. *Sullivan*, 372 U.S. 58, 65.

Consequently, many theatre owners will not exhibit non-obscene films that are controversial, or they can be coerced by threats of prosecution into rejecting such films despite serious literary and artistic value that entitles them to protection under the *Miller* standard. Adults in their communities who choose to view these films thus are deprived of that right; and producers are deprived of their constitutional freedom to exhibit these motion pictures in such communities. Moreover, producers will not risk substantial investments in films that may be barred in various communities through such self-censorship; authors and directors thereby are prevented from creating works of serious literary and artistic value which deal with sexual themes.

This self-censorship, born of uncertainty, also afflicts books. See: *Smith* v. *California*, 361 U.S. 147; *Bantam Books* v. *Sullivan*, *supra*. And it is by no means confined to "hardcore" pornography. As Justice Gunther's opinion emphasizes, the Georgia decision is further proof that those who exhibit or distribute works of widely-hailed literary and artistic value* also can be subjected to the stigmas and strains of criminal prosecutions, the factors that produce self-censorship at the grass roots in most instances (even though, theoretically, a series of appeals might someday vindicate the theatre owner, librarian or bookseller). As this Court stated in *Smith* v. *California*, this self-censorship

* e.g. TROPIC OF CANCER, LADY CHATTERLY'S LOVER, ULYSSES, MEMOIRS OF HECATE COUNTY.

"would be a censorship affecting the whole public, hardly less virulent for being privately administered. Through it, the distribution of all (works), both obscene and not obscene, would be impeded." (361 U.S. at 154)

(ii) A Prior Civil Determination of Obscenity Should be Required

As Chief Justice Burger observed in *Miller*, determining whether a work is obscene requires "resolving the inevitably sensitive questions of fact and law . . .", which must be done under "the jury system, accompanied by the safeguards that judges, rules of evidence, presumption of innocence and other protective features provide . . ." (415 U.S. 26) But so long as states can defer determinations of obscenity until criminal prosecutions of theatre owners or booksellers, *after* they disseminate the work—their self-censorship deprives producers, authors and audiences of any judicial determination in most instances. And theatre owners and booksellers will continue to be denied their right to meaningful notice, in advance, that a particular work is, indeed, obscene under *Miller*.

The Authors League respectfully urges the Court, as we have in earlier amicus curiae briefs*, to require the procedure that will protect these First and Fourteenth Amendment rights—i.e. to prohibit the criminal prosecution of a theatre owner, bookseller or librarian for exhibiting a film or distributing a book, unless the work has previously been adjudicated "obscene" in a full, adversary civil proceeding under a statute such as New York's *Sec.*

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* *Times Film Corporation* v. *City of Chicago*, 365 U.S. 43 (1961); *Ginzburg* v. *United States*, 383 U.S. 463 (1966); *Ginsberg* v. *New York*, 390 U.S. 629 (1968).

6330, Civil Practice Act and Rules. Such an adjudication should be made, as Chief Justice Burger indicated, under the jury system and accompanied by the various safeguards he described.

As Chief Justice Burger stressed in *Paris Adult Theatre*, this proceeding is the most effective method of protecting the First Amendment rights of theatre owners (and booksellers or librarians) since it gives them "the best possible notice, prior to any criminal indictments, as to whether the materials are unprotected by the First Amendment and subject to state regulation." See *Kingsley Books, Inc.* v. *Brown*, 354 U.S. 436, 441-444 (1957)" (*Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49, 55 [1973]).

And in *Miller* v. *California*, Justice Douglas concluded that the First Amendment required this safeguard: "My contention is that until a civil proceeding has placed a tract beyond the pale, no criminal proceeding should be sustained." With a prior civil determination, "a vague law has been made specific", and a prosecution for sales made after that determination "could not violate the time-honored 'void-for-vagueness' test." (413 U.S. 41, 42).

The requirement of a prior civil proceeding would prevent self-censorship by fear or threat of criminal prosecution. Theatre owners, and booksellers or librarians, would know they could not be prosecuted for disseminating works that had not been adjudicated obscene in a civil proceeding. And the adversary civil process provides a more appropriate forum for determining whether the public will or will not be permitted to view a film or read a book. Without the stigma of a criminal prosecution or the threat of jail, theatre owners and librarians would cooperate with producers and publishers in establishing the non-obscenity

of challenged works; and the parties could focus on the primary issue of "obscenity".

(iii) The Requirement of a Prior Civil Proceeding Would not Immunize the "Bootlegging" of Obscene Materials

It is suggested that requiring prior civil determinations would protect those who distribute hardcore pornography that is patently obscene under *Miller*. Immunity from prosecution would result, the theory goes, when such materials are distributed surreptitiously or for a short time, since civil proceedings could not be initiated before their distribution was completed or well under way.

However, the protection of a prior civil determination can be related to a reasonable opportunity for the state to initiate a timely proceeding. For example, films of reputable motion picture producers are publicly announced and advertised in a community in advance of opening, and exhibited at known and permanent theatres. Prosecutors and police are thus forewarned of when and where each film will be presented. From published information, or a prior screening, they have ample opportunity to initiate civil proceedings before the motion picture reaches any substantial audience. Indeed, even a viewing of the opening performance gives sufficient time. Similarly, books by reputable publishers are publicly announced, advertised and reviewed in national trade journals such as PUBLISHERS WEEKLY weeks and months before copies are sold in any bookstore.

Where the circumstances of distribution would not permit competent state authorities to move promptly in court, requirement of a prior civil determination can be conditioned on submission of a copy, or offer of a screening, to

the state's attorney general a short time before exhibition or distribution commences.* Any requirement for submission must be subject to First Amendment safeguards to prevent direct or indirect prior censorship. *Freedman* v. *Maryland*, 380 U.S. 51, 60; *Kingsley Books* v. *Brown*, 354 U.S. 51. The sole purpose of submission would be to provide reasonable time, when it was not otherwise available, for the commencement of a civil proceeding against a work which the attorney general believed: (i) taken as a whole appealed to prurient interest; *and* (ii) portrayed in a patently offensive way specifically defined sexual conduct such as "ultimate sexual acts"; *and* (iii) taken as a whole did not have serious literary, artistic political or scientific value. (415 U.S. at. p. 24).

Submission would not be compulsory; anyone would be free to disseminate any work without complying. But in that event, prior civil determination of obscenity would not be required as a condition for criminal prosecution—unless the film or book had been announced publicly in advance of its dissemination. For the reasons indicated in Point III, the requirement of prior civil determinations, including voluntary submission of works in advance of distribution, should be applied on a statewide basis. Producers and publishers should not be required to send copies, or provide screenings, to thousands of villages, towns, counties and cities throughout the United States.

(iv) Motion Picture Association "Ratings" Should Not be Applied in Obscenity Cases

The Motion Picture Association of America, a trade association of major companies, operates a classification system for motion pictures. "X-rated films are those with content to which no one under 17 is supposed to be ad-

* For federal statutes, submission to the U.S. Attorney General should suffice.

mitted, while R-rated films keep out those who are under 17 except when accompanied by an adult." (New York Times, April 20, 1971; p. 1). Minors are admitted to films rated "G", and those rated "GP" (suggesting "parental guidance"). Not all films are submitted to the Association for "rating".

There have been suggestions that the "X" rating might be applied in obscenity prosecutions as evaluative evidence, or as an indication the exhibitor had "notice" that such films were "obscene" under state statutes and the *Miller* standard. (cf. Washington Star-News, December 10, 1973, p. 1). Any judicial application or recognition of the "rating" system would gravely impair the First Amendment rights of producers, exhibitors and audiences.

The X and R ratings given to motion pictures do not reflect any judgment by the Association's Rating Administration that such films are "obscene" under obscenity statutes, applied generally or to children. A rating only reflects the conclusion of Association personnel—under vague, imprecise and sometimes malleable standards—that children should not be admitted or must be accompanied by an adult. Violence, rather than sexual content, may earn an "X" rating. X ratings have been given to non-obscene works of serious (indeed superior) literary and artistic value, which were neither pruriently appealing or patently offensive in describing sexual conduct—e.g. MIDNIGHT COWBOY and CLOCKWORK ORANGE. And R ratings have been given to works of highly regarded artistry, without any prurient appeal or patently offensive depiction (or violence), such as SUMMER OF '42. (FILM RATINGS FLUNK OUT, Thomas Thompson, LIFE; August 20, 1971; p. 50B, 54)*

* Mr. Thompson made a suggestion also advanced by others: "My opinion is that the system should be simplified—drastically. There should be only two rating symbols: family films for everybody and adult films for selected audiences." (p. 57).

The Association's rating system has produced substantial restraints on the exhibition of some motion pictures, and on the First Amendment rights of exhibitors, audiences and those who create films. Several newspapers refuse advertisements for any X-rated film, regardless of its content or nature of the advertisements. This "fact (that) makes it extremely hard for exhibitors to make the showing of such films locally known." (New York Times, April 20, 1971; pp. 1, 48). A 1970 survey disclosed that 47% of theatres participating in the voluntary system would not play any X-rated picture; and participating theatres represented 89% of the 13,000 in this country. (Vincent Canby, New York Times, March 22, 1970; IV, p. 1) Moreover, the rating system stimulates changes in the content of some films, in advance of their release. (cf. FILM RATINGS FLUNK OUT, *supra*; Vincent Canby, New York Times, *supra*.)

As this Court indicated in *Smith* v. *California*, 361 U.S. 147, these restrictive consequences are "hardly less virulent", because the machinery that generates them is "privately administered", and they "affect(ing) the whole public" (at p. 154). The ratings of such a private system should not be applied directly or indirectly in the enforcement of obscenity statutes. *Smith* v. *California*, *supra*; *Bantam Books* v. *Sullivan*, 372 U.S. 58. To apply them would give added sanction to private decisions that can adversely affect First Amendment rights of exhibition for many films. These decisions are made by a trade association's employees, not a judge and jury; they are not subject to the safeguards which must govern judicial determinations of obscenity; and they cannot be appealed to appellate courts.

POINT III

Works Not Obscene Under a State-Wide Community Standard Cannot be Held Obscene under "Local" Standards.

(i) CARNAL KNOWLEDGE is not "Prurient" or "Patently Offensive"

Since CARNAL KNOWLEDGE is a work of serious literary and artistic value, it could not be ruled obscene even if, taken as a whole, it appealed to prurient interest and it depicted sexual conduct in a patently offensive manner. However, it is not guilty of either prurient appeal or patent offensiveness. Like " 'dominance' of the theme", both tests present "question(s) of constitutional fact" which this Court must decide. *Kois v. Wisconsin*, 408 U.S. 229, 232. By no stretch of the first two *Miller* constitutional standards can it be said that CARNAL KNOWLEDGE, taken as a whole, appeals to the prurient interest of Georgia's "average man"; or that the two or three brief scenes which may have offended the personal sensibilities of the Georgia Court's majority constituted patently offensive portrayals of sexual conduct.

(ii) The First Amendment Prohibits a Crazy-Quilt System of Local Censorship

In *Miller*, this Court decided that a state-wide, rather than a national, community standard could be applied in determining whether a film or book appealed to prurient interest or depicted sexual conduct in a patently offensive way. However, the Supreme Court of Georgia—contrary to those of New York and California*—held that juries

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* *New York* v. *Heller* (not off. reported); *In re Giannini*, 69 Cal. 2d 563.

could find a film or book pruriently appealing and patently offensive under local community standards even though it was not pruriently appealing or patently offensive under the state-wide standard. We submit this is incorrect. *Miller* did not reach that conclusion. For example: Chief Justice Burger stressed the need to carefully limit "state statutes"; to define conduct proscribed by the "applicable state law"; and to limit a "state offense" to works failing all three tests of the *Miller* standard. (413 U.S. 24)

There are thousands of local communities in the United States. If a motion picture's (or book's) alleged prurient interest or patent offensiveness could be established separately, under the differing standard of each community in which it was disseminated, reputable motion picture companies and publishers would be compelled to eschew non-obscene films or books likely to arouse opposition in some communities because of sexual themes. These companies produce and distribute works for national audiences. They cannot afford to risk the loss of several markets through self-censorship by exhibitors and booksellers, born of fear or threat of prosecution under a vast hodgepodge of local standards. Nor can they afford to defend the innumerable prosecutions that could be spawned by such a crazy-quilt system of local censorship. If prurient appeal and patent offensiveness are determinable under "local" community standards, then an appellate decision absolving a work distributed in one city still leaves it exposed to many more prosecutions in the same state—under differing standards of other cities, towns, villages and counties.

We respectfully urge the Court to confirm that a motion picture or book which is not pruriently appealing or pat-

ently offensive under a state's community standard cannot be held obscene by applying local community standards. It also bears confirming, for those who have misinterpreted *Miller*, that determination of the serious literary or artistic value of a work does not involve application of a state-wide or local "community standard". We also urge the Court to explain that the "community standards" applied in determining prurient appeal or patent offensiveness are the average man's "values", which the jury considers in assaying the work's "impact on the average person" (413 U.S. 33). Many reporters and legislators have erroneously assumed that a "community standard" is a set of rules, established by local legislation, which supplants state obscenity statutes and redefines "obscenity" in each local community.

(iii) A State-Wide Standard Need Not Bar Works from Communities Where They are "Acceptable"

Some see a possible dilemma: i.e. that a state-wide community standard might bar some works from a few communities where they would be "acceptable" under "local" standards. But even that would involve a far less drastic restriction (if any) on the production, publication and dissemination of non-obscene works, than a construction which allowed films or books acceptable under the state standard to be prosecuted repeatedly by applying differing local community standards. Producers, publishers, theatre owners and booksellers need the certainty—guaranteed, we believe, by the First and Fourteenth Amendments—that a film or book acceptable under the state standard

can be disseminated in any of its communities without fear of multiple prosecutions.*

Moreover, the First Amendment offers a simple resolution of this largely theoretical dilemma: that is, a holding (i) that any film or book which is not pruriently appealing or patently offensive under a state's community standard cannot be held obscene by applying local community standards; *and* (ii) that any film or book which is not pruriently appealing or patently offensive under the standards of a local community can be distributed within that community even though the work is not acceptable under the state community standard.

CONCLUSION

It is respectfully submitted that the judgment of the Supreme Court of Georgia should be reversed.

Respectfully submitted,

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* Under *Heller and Giannini*, a producer would need only one appeal to each state's highest court to establish his First Amendment right to exhibit a challenged motion picture in New York and California. If "local" community standards are held to prevail, he might need 58 appeals in California and 62 in New York —*if* only county standards applied. If city, town and village standards also applied, he might need hundreds of appeals. On a nation-wide level, the choice lies between a maximum of 50 appeals under state standards and thousands of appeals under local standards. For example: in 1972 there were 3,044 counties, 18,517 municipalities and 16,991 townships in the United States. [1973 Statistical Abstract of the United States, p. 412]

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Interest of the Amicus Curiae

The Council for Periodical Distributors Associations, Inc. ("CPDA") is the national trade association for over 500 independent local wholesale distributors of comic books, magazines and paperback books.

The International Periodical Distributors Association, Inc. ("IPDA") is the trade association for the twelve principal national periodical distributors engaged in the business of distributing or arranging for the distribution of paperback books and periodicals to wholesalers for ultimate distribution to retailers and the public throughout the United States.

The Periodical and Book Association of America, Inc. ("PBAA") is an association of publishers of magazines and paperback books sharing a common interest in the sale of their products through independent distribution channels employing the members of IPDA and CPDA.

The members of IPDA and CPDA constitute the principal distribution channel for the mass market sale of comic books and magazines to retailers within the United States, including such retail outlets as newsstands, drug and food stores and bookstores. Their members are also a major distribution channel for the sale of paperback books through such retail outlets. During 1973 over 100,000 retail customers were supplied through these distribution channels with comic books, magazines and paperback books having an estimated retail sales value of two billion dollars. The members of IPDA and CPDA constitute the principal independent distribution channel for all of the nationally known magazines (e.g. Time, Readers Digest, Playboy, Family Circle, TV Guide) and the major paperback book lines (e.g. Dell, Bantam, Fawcett, Pocketbooks).

Historically the Amicus Curiae have been vitally interested in the legal problems associated with obscenity and have sponsored state legislation and filed amicus curiae

briefs before this Court in prior obscenity cases (e.g. *Redrup* v. *New York*, 386 U.S. 767 (1967)). This interest stems directly from the fact that they, and ultimately their retail customers, are the principal source for most of the magazines and paperback reading material sold to consumers at retail locations throughout the United States. They have a compelling business interest in what materials may lawfully be sold under state or local criminal laws.

This amicus curiae brief is filed pursuant to the order of this Court dated December 10, 1973 in this case and blanket consents which Amicus Curiae understand have been filed by the parties.

The Importance of This Case

In *Roth* v. *United States*, 354 U.S. 476 (1957), this Court established that the protection of the First Amendment extended to motion pictures and written materials dealing with sex and imposed standards with which state law must comply before published material could be barred as obscene. These standards were articulated in a series of decisions culminating in *Memoirs* v. *Massachusetts*, 383 U.S. 413 (1966), and *Redrup* v. *New York*, 386 U.S. 767 (1967). These decisions, as applied thereafter in subsequent "Redrupped" *per curiam* decisions of this Court, were interpreted by the bar and the publishing industry as sharply limiting the application of the obscenity laws to "hard core" pornography not produced by the legitimate publishing industry served by the Amicus Curiae.

In response to changing mores in the United States as reflected in the published material sought by the public, the publishing industry is currently publishing magazines and paperback books whose content, although not "hard core" in any traditionally understood sense of that term, is increasingly frank in the depiction and description of matters relating to sex.

The decision of this Court in *Miller* v. *California*, 413 U.S. 15 (1973) and the companion cases decided June 21, 1973, whether or not so intended by this Court, have been broadly interpreted by law enforcement officials, law making bodies and others as narrowing the First Amendment protection built upon *Roth* and upon which the existing system of national distribution of magazines and paperback books is based.

The instant case presents the first opportunity since *Miller* to examine the scope and effect of the revised three-prong test of obscenity announced in *Miller* and to consider the procedural safeguards necessary to prevent the chilling effects of local censorship under threat of criminal prosecution.

Already numerous instances of threats of criminal prosecution have resulted in the withdrawal of nationally known magazines from circulation in many cities throughout the United States. Most such incidents go unreported in the press and rarely result in reported judicial decisions.

The effectiveness of threatened criminal prosecution in imposing self-censorship follows directly from the nature of the mass magazine and paperback distribution system. The editorial content of magazines and paperback books is, of course, decided upon by their publishers. The books

or magazines are then shipped directly from the printing plant to CPDA member wholesalers pursuant to allocations set by IPDA members. The publications are received in bulk by the wholesalers who distribute them to their retail dealers, often within three or four days after delivery to meet scheduled "on sale" dates. At no stage does the wholesaler or retailer specifically order the periodicals that each sells or review or approve editorial content. Indeed, they cannot realistically do so. There are approximately 500 separate publishing houses in the United States, publishing a conservatively estimated 1400 national and regional magazines as well as issuing approximately 5000 new paperback releases annually. The sheer bulk of new titles effectively precludes review prior to sale at all levels of commercial distribution.

Under this system retailers and wholesalers alike are particularly vulnerable to coerced and self-imposed censorship. The materials typically are "on sale" before anyone has examined their content. All the ingredients supporting an arrest exist before any question has been raised about a particular issue.

In addition, an increasingly large portion of retail sales of all magazines and paperbacks takes place at drug and food store locations principally engaged in sales of products for family use. Understandably such retail outlets are concerned about their general reputation in the community and are reluctant to risk arrest.

Moreover, since two prongs of the legal test of obscenity—prurient appeal and offensiveness—are highly subjective, even examination of the materials would not readily disclose whether or not they might be deemed to be ob-

scene, particularly under the *Miller* local community standards test.

The interest of the Amicus Curiae is frankly commercial. Their members, particularly the wholesaler members of CPDA and their retail customers, operate locally and must deal directly with law enforcement and elected officials in their communities. The fact is that, at the local level, the content of magazines and paperbacks is judged largely outside any judicial forum. Ambiguity, uncertainty or the exercise of local discretion in determining what is obscene creates (and has already created under *Miller*) a climate within which self-censorship under threat of arrest takes over. This is the significant and operative level at which censorship decisions occur.

Because the *Miller* decision has been widely interpreted as narrowing the protection heretofore granted by this Court to published materials, the Amicus Curiae urge the Court to take this opportunity to confirm the limited area within which the obscenity laws may operate and make it clear that materials not within the traditionally "hard core" category are not subject to them.

Summary of Argument

1. Fairness and the requirements of due process demand a clear-cut and understandable test which distributors and booksellers can apply in determining whether particular magazines and paperbacks are obscene. To avoid the chilling effect of uncertainty as applied to materials dealing frankly with sexual matters, such as in "Carnal

Knowledge" in this case, the Court should reemphasize that *Miller* meant only that "hard core" pornography is obscene and that "hard core" pornography includes only actual and explicitly described and depicted ultimate sexual acts and not, *inter alia*, mere nudity, profanity or other sexually oriented content. Such a test, although certain materials within that category might be redeemed by a showing of serious purpose under other aspects of the *Miller* test, would establish an understandable and workable minimum criterion for distinguishing clearly lawful material. Only such clarity will enable sellers to resist the pressures for self-censorship.

2. However carefully and narrowly drawn by this Court, any test of obscenity inevitably will involve subjective judgments in determining whether or not particular material is within or without the ambit of constitutionally protected speech. Prosecutors and booksellers alike will be presented with the necessity of judging borderline materials. Under the existing practice of treating obscenity as a crime, booksellers are highly susceptible to official or unofficial suggestions that certain material should not be sold or displayed. Clearly, under the decisions of this Court, such determinations are a judicial function, but in practice the vast majority of censorship instances proceeds informally and non-judicially. The difficulty of applying the legal test of obscenity, as well as the fact that many book wholesalers and retailers cannot and do not review the vast flow of magazines and books they handle, renders criminal prosecution too crude a basis for regulating the subject matter of books and magazines and requires a mandatory prior civil determination of obscenity before criminal proceedings can be instituted.

3. The term local community standards should be clearly defined and should include a sufficiently large community to be fairly representative of a generally accepted viewpoint regarding prurient appeal and the offensiveness in the depiction of sexual matters. At a minimum such community should be statewide and, preferably, national. In determining whether the material has sufficient "serious" purpose to redeem it from the obscene category, the insularities and prejudices of even a particular state should not prevent a local resident from obtaining material deemed valuable elsewhere in America. The value and purpose of any material should, therefore, be tested against a national standard.

ARGUMENT

I

The only workable test of obscenity is that which is limited to the description or depiction of actual conduct of the kind traditionally recognized as hard core pornography.

The Amicus Curiae will not attempt to analyze extensively the meaning and legal antecedents of the three-prong test of obscenity laid down in *Miller* v. *California*, 413 U.S. 15 (1973), which doubtless will be dealt with by the parties and other amicus curiae. However, as the representatives of the distribution arm of the mass magazine and paperback industry, we wish to focus the Court's attention upon the enormous practical difficulty of applying any obscenity test which does not, at a minimum, allow a reasonable determination that certain material is not obscene by examining its content without regard to the illusive and sub-

jective concepts of prurient appeal, patent offensiveness and possibly redeeming value or serious purpose.

For nearly two decades the Court's docket has been crowded with obscenity appeals resulting in frequent reversals of state and lower federal court judgments and the expression of widely divergent views by the members of this Court on the appropriate legal test of obscenity and its application to particular materials. With some accuracy it has been said that no obscenity determination is final until affirmed by a majority of this Court. Indeed, the difficulty of drawing the line between protected material and the obscene has persuaded three members to this Court to conclude the line cannot be drawn. See dissenting opinion of Justice Brennan in *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49, 73 (1973).

Justice Brennan's views, of course, were rejected by the *Miller* majority and Amicus Curiae is not seeking to reargue whether the First Amendment does allow censorship. However, as this Court recognized, there are "inherent dangers" in regulating expression and confined such regulation to matters "which depict or describe sexual conduct." *Miller* v. *California*, 413 U.S. 15, 24.

Despite the repeated statements of the Court that *Miller* meant to prohibit only "hard core" pornography, references in the opinions to "sex and nudity", and the inclusion of the terms "simulated" sex acts and "lewd exhibition of the genitals" in the statutory framework suggested in *Miller*, have led some, evidenced by the decision of the Georgia Supreme Court in this case, to conclude mere nudity, such as in "Carnal Knowledge" constitutes obscenity.

This interpretation has resulted in numerous threats of prosecution against retailers and wholesale distributors of such nationally known magazines as Playboy and Penthouse. In many localities the sale of these magazines has been stopped. Many retailers have requested their wholesale suppliers to cease delivering copies to them, either after informal warning by police officers or as the only way to avoid possible prosecution. Even those in the industry are not fully informed of the scope of these actions, but the instances reported by members of the Amicus Curiae indicate they are widespread and increasingly effective. Significantly, this has increased since *Miller* and before most state legislatures have even adopted the *Miller* test. And, although the principal focus of these efforts currently is upon magazines, paperback books, which also frequently deal with sexual relationships, are increasingly threatened.

The practical reality is that any definition of obscenity not limited to actual and specifically identified sexual acts can be broadly applied to any material dealing with sex and, thereby, gives rise to censorship abuses such as those noted above. Undoubtedly material that would not be deemed obscene by this Court will be considered subject to question and either deleted at the publishing level or withheld from retail sale in many communities. Only a "hard core" test will enable publishers and distributors to ascertain with reasonable certainty that at least certain material is not obscene and, thereby, enable them to resist the informal censorship which is the effective level at which the obscenity laws operate.

Of course, material falling within the description of "hard core" pornography might be saved under the other prongs of the *Miller* test, such as upon a showing of serious literary, artistic or other value. But adoption of a minimum hard core test will sharply limit non-judicial censorship by threat or that arising from uncertainty and will, in addition, effect substantial judicial economies when the great bulk of published material is removed from question.

II

The requirements of due process and the effect of self-censorship under fear of prosecution require a civil determination of obscenity prior to the commencement of criminal proceedings.

Obviously and inevitably there will remain substantial areas of uncertainty regarding particular publications, including works of fiction or educational materials dealing with sex. These areas of uncertainty raise all of the problems of coercion by local police or elected officials and the consequent self-censorship by book wholesalers and retailers described above. There is also the substantial problem of fairness and due process for booksellers, who realistically cannot and do not review the content of each magazine or paperback they sell, but who are subject to criminal prosecution and, in many states, are presumed to have knowledge of the contents of all of their publications. See e.g. *People* v. *Kirkpatrick*, 32 N.Y.2d 17, 343 N.Y.Supp. 2d 70 (1973), appeal dismissed 42 U.S.L.W. 3244 (U.S. Oct. 23, 1973), upholding such a provision under the New York State obscenity law.

In the *Miller* decision and the related cases decided last year, the Court concluded that the *Roth-Memoirs* tests were largely unworkable and sought through the revised *Miller* test "to clarify the constitutional definition of obscene material * * *." *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49, 55. As is apparent from the conviction of Billy Jenkins, that effort failed. Any obscenity test formulated by this or any other Court cannot draw a line unambiguously distinguishing obscene from protected works in every case. Inevitably, reasonable men can and will differ in their judgments of particular magazines or books.

Consequently, borderline cases will arise and, under threat or risk of prosecution, materials that are not obscene will be denied to the reading public, either at the behest of local officials or "voluntarily" by wholesalers or retailers unwilling to risk arrest. And, to the extent such material is distributed, an entire industry will be conducted under threat of criminal prosecution with no reasonable and predictable basis for determining in advance whether its products may lawfully be sold. Indeed, in many instances the legality of particular magazines and books will vary with the standards of particular communities within the United States.

The plain fact is, whether viewed from the perspective of fairness to booksellers under our system of criminal justice, or in terms of the very real impact obscenity laws have upon the distribution of reading material and its availability to the public, the criminal law is not an effective

tool in the first instance for regulating the sale of obscene materials. The Amicus Curiae have for many years supported legislation which, in recognition of these problems, requires a prior judicial determination of obscenity in a civil proceeding analogous to a declaratory judgment. Upon such finding and notice to booksellers of such determination, continued sale of the material is then subject to criminal proceedings.

This Court itself has expressed its preference for a procedure under which a civil proceeding for determining obscenity precedes any criminal prosecution. As Chief Justice Burger observed in *Slaton*:

> "such a procedure provides an exhibitor or purveyor of materials the best possible notice, prior to any criminal indictments, as to whether the materials are unprotected by the First Amendment and subject to state regulation." (413 U.S., at 55)
>
> • • •
>
> "[Such] procedure would have even more merit if the exhibitor or purveyor could also test the issue of obscenity in a similar civil action, prior to any exposure to criminal penalty." (413 U.S., at 55 n. 4)

The Amicus Curiae believe that the requirement of a prior civil determination of obscenity permits the states to effectively control sales of unprotected material without needlessly and unjustly victimizing booksellers and motion picture exhibitors under the threat or actual imposition of criminal penalties and the severe financial burdens and unfair toll on reputation. We believe that such a civil procedure is necessary to protect against the chilling effects

of vigilante and self-censorship of controversial but constitutionally protected material.[1]

A criminal statute, in the hands of a prosecutor, acting either on his own initiative or under pressure from vocal minorities, could subject the local librarian, the man who runs the neighborhood movie theatre, the corner bookstore clerk or even the druggist who carries paperbacks in his store to the same criminal sanctions and personal humiliations as the professional pornographer. The threat of prosecution imposes an intolerable burden upon their right and responsibility to make a broad selection of constitutionally protected materials available to the public.

The alternative, if criminal proceedings remain a permitted method for testing obscenity, is that the involvement of police and other non-judicial officials condemned by this Court in *Roaden* v. *Kentucky*, 413 U.S. 496 (1973), will continue unabated and unsupervised at the point where the most important censorship decision is made—i.e. by the wholesaler or retailer in determining what he will sell.

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1. Numerous instances have been reported to counsel for CPDA of police officers requesting retailers to discontinue handling or displaying magazines about which complaints have been made. Since the alternative is an arrest, retailers normally comply. In certain cities an understanding exists between the wholesale distributor and the local police department that questioned material will be withdrawn from sale throughout the city. This is not to suggest Gestapo tactics by the police, but rather the practical accommodation that exists and will exist under a criminal procedure and which operates totally without effective judicial supervision.

III

The scope of the community within which standards of prurience and offensiveness are determined should be national and not smaller than statewide.

In rejecting national standards for judging prurient appeal and patent offensiveness, the Court stated it was not constitutionally required that "the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas or New York City." *Miller* v. *California*, 413 U.S. 15, 32 (1973). The reference to cities as well as states has given rise to speculation that any or all "local" governmental units may determine what is obscene. Although several state Supreme Courts have rejected this interpretation, in favor of statewide standards,[2] the Georgia Supreme Court in this case held that "Carnal Knowledge" was indeed to be judged by the standards of Albany, Georgia. Moreover, throughout the United States cities, towns and even villages are passing ordinances employing local standards and it has even been suggested, not necessarily facetiously, that what is lawful in Manhattan might not be in the Bronx.

The Amicus Curiae share the concern of the publishing industry generally that even the use of fifty possibly widely diverging state standards will seriously impair the ability of publishers to serve the national market for periodicals and paperback books. But difficult as it may be to work

2. See e.g., *People* v. *Heller*, —— U.S. ——, 93 S.Ct. 2789, *on remand*, —— N.Y. 2d —— (1973) and *State* v. *J-R Distributors, Inc.*, 512 P.2d 1049 (Wash., July 27, 1973).

with fifty standards, it is clearly impossible for the industry, and particularly the wholesaler members of CPDA and their retailers, who frequently distribute in more than one city or other political subdivision, to know and comply with the preferences and peculiarities of each local community that they serve.[3]

Accordingly, we urge the Court to make it clear that *Miller* meant only to reject the notion that the mores say of New York City are to be superimposed upon the entire country, and that at a minimum a statewide standard must be employed in every instance regardless of the jurisdiction in which an obscenity law is passed.

We also join others in urging the Court to reconsider its rejection of a national standard in judging prurience and offensiveness. Use of a national standard would not constitute "the absolutism of imposed uniformity", but rather the assurance that those within a state holding views common to most Americans would not be deprived of literature offensive only to a local majority. Even under such a national standard, the views of a local Sodom and Gomorrah, if such there be in this country, would not set the standard because it would not be representative of the view held by most or a majority of Americans regardless of the state in which they live.

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3. Food and drug chains typically control the purchasing activities of local stores on a regional basis. In the periodical industry this has led to the issuance of acceptable title lists by the chains' regional office, which specifies the titles wholesalers may deliver. It is likely that arrests or threats anywhere within the region will result in deletion of the questioned title from the acceptable list. As a result, local standards will have an impact far beyond the particular community setting them.

Should the Court choose to adhere to its *Miller* position and apply statewide standards, the Court should emphasize that the redemption of a particular book is based upon national standards of seriousness of purpose. It is difficult to believe that the Court intended this determination to be made on a local basis, since it is likely in practice to be coterminous with a finding by the trier of fact of prurience and patent offensiveness. Moreover, as in the instant case, the result will be that serious motion pictures, generally accepted magazines and best selling paperbacks and other books of a serious nature will surely be held unlawful in certain communities.

Such a result will truly fragment the national publishing industry and render unavailable in particular communities material conceded to have nationally accepted value. We believe this issue above all must be determined on a national basis and upon evidence of expert testimony showing the value and purpose of the work.

Conclusion

The Court's ongoing and apparently endless attempt to "solve the intractible obscenity problem,"[4] makes all too understandable the Court's laudable attempt in *Miller* to redefine obscenity in a more workable manner and to enable prosecutors to bring and win cases against the hard core pornographer. Regrettably, *Miller* has been taken by some as a signal to return to censorship not only of "hard core" materials, but also ultimately of any matter dealing

4. *Interstate Circuit, Inc.* v. *Dallas*, 390 U.S. 676, 704 (1968) (Harlan, J. concurring and dissenting).

frankly with sex. By failing to clarify precisely where the line between the proper and the obscene is, and by simplifying the trial procedures and by eliminating the *Memoirs* burden of proof on redeeming social value, the Court has inadvertently opened the door to prosecution and harassment of local wholesalers and retailers for selling magazines and paperbacks accepted generally within the United States.

Amicus Curiae believe that use of a strictly "hard core" test, adoption of a civil procedure complementing the innovations contained in *Miller*, and employment of at least statewide and preferably national standards for judging subject matter content, will enable the states to regulate and stamp out "hard core" pornography without impinging upon the right of Americans to otherwise read and see what they wish.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-557

BILLY JENKINS,

Appellant,

V.

STATE OF GEORGIA,

Appellee.

BRIEF FOR APPELLEE

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-557

BILLY JENKINS,

Appellant,

V.

STATE OF GEORGIA,

Appellee.

BRIEF FOR APPELLEE

JURISDICTION

Jurisdiction is doubted upon the ground that the issues do not present a substantial federal question, and on the ground that the judgment rests on an adequate non-federal basis.

The Georgia statutory scheme for prohibiting obscenity was authoritatively construed by the trial court in its instructions to the jury, and by the Georgia Supreme Court, in the decision below. It was construed as a matter of state law, and, as so construed, was constitutional under numerous prior holdings of this Court. Because the trial court correctly construed

the statutory proceedings in its instructions to the jury, Appellant was not denied the due process of law. In point of fact, he was granted more rights under the Georgia law than he would have been granted under an equivalent federal prosecution.

QUESTIONS PRESENTED

Appellee cannot agree with the Appellant's statement of the questions presented to this Court by this appeal for the simple reason that Appellant fails to consider the issues in fact appealed to and decided by the Georgia Supreme Court, fails to note that other issues were expressly abandoned, and fails to note that every issue raised was "ab initio". The Appellee would restate the questions presented by this appeal as follows:

I. **WHERE THE APPELLANT CONCEDED THE ISSUE IN STATE COURT AND FAILED TO RAISE AN ISSUE ON *WHETHER OR NOT THE FILM "CARNAL KNOWLEDGE" IS OBSCENE*, MAY THE ISSUE BE RAISED "AB INITIO" BEFORE THIS COURT.**

II. **WHETHER THE APPELLANT IS CONFINED TO THE BREADTH OF ISSUES RAISED BEFORE THE GEORGIA SUPREME COURT IN HIS CONSTITUTIONAL ATTACK ON GEORGIA CODE ANN. §26-2105, RATHER THAN ISSUES RAISED "AB INITIO."**

III. **WHERE THE ONLY ISSUE RAISED AND DECIDED REGARDING THE APPLICABLE**

STANDARD WAS IN REFERENCE TO THE CHARGE OF THE TRIAL COURT, *WHERE APPELLANT CONTENDED THAT THE TRIAL COURT SHOULD HAVE CHARGED THAT "NATIONAL COMMUNITY STANDARDS" SHOULD APPLY*, MAY THE APPELLANT RAISE THE ISSUE *WHETHER IT IS CONSTITUTIONALLY PERMISSIBLE TO EMPLOY "LOCAL" AS DISTINGUISHED FROM STATEWIDE STANDARDS "AB INITIO."*

IV. WHETHER A "DUE PROCESS" ISSUE MAY BE RAISED FOR THE FIRST TIME "AB INITIO."

V. WHETHER THE SIMPLICITY OF THE TRADITIONAL JURY SYSTEM SHOULD BE UTILIZED RATHER THAN COMPLEX APPELLATE REVIEW IN EVERY CASE.

STATEMENT OF FACTS

Appellant, Billy Jenkins, manager and president of the Broad Avenue Cinema in Albany, Georgia, exhibited the motion picture "Carnal Knowledge" on January 13, 1972. The film was seized pursuant to a search warrant (JA 6), and Appellant was arrested for the offense of Distributing Obscene Materials. Robert W. Reynolds, District Attorney, Dougherty Judicial Circuit, returned an accusation to Superior Court charging Appellant with the offense of Distributing Obscene Materials. Trial was held on March 22 and 23, 1972. The jury, after viewing the film, hearing evidence introduced on behalf of the defendant, *none involving evidence supporting "Carnal Knowledge" as a serious literary work*, and being

properly instructed, returned a general verdict of guilty. On appeal to the Georgia Supreme Court, Appellant's conviction was affirmed; the Georgia statutory scheme for the prohibition of obscenity was authoritatively construed; and the trial court's instructions to the jury were ruled correct.

Under Georgia's evidenciary rules, the unsworn statement of the Appellant did not establish the following as probative evidence contrary to Appellant's brief:

"Carnal Knowledge" is a motion picture which was acclaimed critically as one of the "10 Best" films of the year 1971 (JA 24, 59). Actress Ann-Margret received an Academy Award nomination for her performance (JA 24). The film enjoyed popular acceptance throughout the nation, including many cities and towns within the State of Georgia (JA 24, 59). (Appellant's Brief pp. 5, 6)

Contrary to Appellant's contentions, the following issues were *not* raised below:

Jenkins appealed the judgment to the Supreme Court of Georgia, arguing that §26-2105 was unconstitutional on its face and as applied to him; that he was denied due process of law; that "local" community standards could not constitutionally be employed; and that the film "Carnal Knowledge" is not obscene in any case (Appellant's Enumeration of Errors in the Supreme Court of Georgia, JA 46-51). (Appellant's Brief p. 9)

ARGUMENT

I.

WHETHER OR NOT "CARNAL KNOWLEDGE" IS OBSCENE WAS NOT RAISED BELOW.

The Appellant finally contends that this Court should determine "whether the film 'Carnal Knowledge' is obscene." He urges that this Court should reverse the finding of facts by the jury below, that "Carnal Knowledge" is obscene under the Georgia test of obscenity.

A cursory review of the record below shows this issue was conceded and not raised below. Not one of Appellant's forty-three enumerations below questioned this point, and Appellant failed to argue this point in his brief below. For this reason, the Georgia Supreme Court did not reach or decide this question. It decided only "that the evidence in this record amply supports the verdict of guilty." *Jenkins v. State*, 230 Ga. at 728. Since Appellant failed to raise this question below in a proper and timely manner, and because Appellant is attempting to raise this question for the first time in this Court, this Court should not reach or decide the issue.

If the Court should reach this issue, the issue should be decided upon the evidence available to the jury and of probative value.

II.

APPELLANT DID NOT RAISE THE BROAD ISSUE BELOW AS TO WHETHER GEORGIA CODE ANN. §26-2105 IS UNCONSTITUTIONAL ON ITS FACE OR THE DUE PROCESS ISSUE BELOW.

The Appellant did not raise any such issues below. Appellee has included the grounds so raised in the following materials:

Appellant is contending, in effect, that he raised, in a proper and timely manner, in the court below, a

broad question regarding the constitutionality of the Georgia statutes herein under attack, *i.e.*, *Georgia Code Ann.* §§26-2011 and 26-2105, *and* that the Georgia Supreme Court, as a basis for its decision, held that the statute did not violate the federal law.

Assuming, without conceding, that Appellant did raise, in a proper and timely manner, such a question, it did not constitute a basis for the decision appealed from. The Georgia Supreme Court resolved the questions concerning Code sections 26-2011 and 26-2105 by simple statutory construction consistent with prior (Georgia) case law. Appellant contended, at page 7 of his brief to the court below, that the "question raised is whether the Statute [*i.e.*, §26-2105] is constitutional under the First Amendment . . . for failure to include as an essential element of the purported crime . . ." the language of Code section 26-2101(b). The Georgia Supreme Court ruled, as a matter of state law, "that sections of the code which relate to the same subject matter shall be construed together. *See, Touchton v. Echols County*, 211 Ga. 85, 87 (84 SE2d 81)." Under the authority of *Murdock v. Memphis*, 20 Wall. 590, 22 L.Ed. 429 (1875), since the decision below on that point is supported by an adequate state ground, this Court should not accept jurisdiction.

Appellant further contended to the court below, that an issue presented was:

> Does the accusation, and the statute upon which it is based, . . . construed in connection with . . . the definition of the word "knowingly" violate the First Amendment . . . by depriving defendants of First Amendment freedom of ex-

> pression in burdening defendant with self-censorship?

Nowhere in Appellant's brief in the court below is this point argued, although it is referred to tangentially in connection with another issue. Under existing Georgia law, *Spurlin v. State*, 228 Ga. 2, 6 (5) (1971), Appellant is deemed to have abandoned this issue in the court below, which explains fully why the Georgia Supreme Court failed to even mention, much less to decide, the question. (See express waiver also. Appellant's Brief below p. 9)

Appellant's final constitutional attack on the two Georgia statutes may be found at page 8 of his brief to the court below.

> Enactment of Section 26-2011 . . . forbidding certain acts in a public place is obviously legitimate as respects the First Amendment. It is equally obvious that it is constitutionally forbidden under the First Amendment to render the same conduct a crime in a non-public place, that is, a motion picture.

The basis for Appellant's argument here is that a motion picture shown in a "non-public" place, *e.g.*, a theatre, to a willing audience, is protected under this Court's ruling in *Stanley v. Georgia*, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969). However, that question had previously been disposed of adversely to Appellant's position by the Georgia Supreme Court in *Slaton v. Paris Adult Theatre I*, 228 Ga. 343 (1971). That latter decision was affirmed by this Court in *Paris Adult Theatre I v. Slaton*, _____ U.S. _____, 93 S.Ct. _____, 37 L.Ed.2d 446 (1973), where it was stated that the exhibition of obscene material

in places of public accommodation is not protected by any constitutional doctrine of privacy. A commercial theatre cannot be equated with a private home; nor is there here a privacy right arising from a special relationship; nor can the privacy of the home be equated with a "zone" of privacy that follows a consumer of obscene materials wherever he goes. Thus, Appellant's final constitutional attack cannot support this Court's jurisdiction because not only had the argument been expressly foreclosed by an authoritative decision of this Court so as to leave no room for real controversy, but the decision rested on an independent and adequate state ground, albeit a case affirmed by this Court.

Not one of Appellant's three "constitutional" arguments can be a basis for this Court's acceptance of jurisdiction under 28 U.S.C. §1257(2). As is pointed out above, Appellant abandoned one constitutional argument below; one argument was decided on the basis of prior Georgia case law as a matter of statutory construction; and one argument has been authoritatively decided against Appellant's position by a prior decision of this Court, in *Paris Adult Theatre I v. Slaton*, *supra*. Therefore, this Court should reject jurisdiction of this case because there was no decision below upholding the constitutionality of the statutes in question.

Furthermore, Appellant did not raise, in a proper and timely manner, any question concerning the constitutionality of these statutes. The second "constitutional" question mentioned above was abandoned below, and thus cannot be deemed to have been raised, much less decided, by the court below. The first "con-

stitutional" question mentioned above did not attack the constitutionality of the statute. Instead, it attacked the accusation on the basis that it did not include an essential element of the crime of distributing obscene material to wit: the test of obscenity. It was this question which the Georgia Supreme Court decided adverse to Appellant's position on the basis of statutory construction. The final "constitutional" question allegedly raised below was not proper because it had been authoritatively decided by the Georgia Supreme Court previously, adverse to Appellant's position. It was for this reason that the court below did not even decide the question. No other "constitutional" question was raised by Appellant in attacking the statutes in question.

However, even if this Court believes that Appellant did raise, in a proper and timely manner, any one of the constitutional questions presented *and* even if this Court believes that any one of these questions served as the basis for the decision below, no substantial federal question is raised by Appellant's first two contentions.

The statute under which Appellant was convicted is constitutional on its face, as applied, and as construed and the Appellant was not denied due process of law. Appellant's first two "questions presented" are treated jointly because they essentially raise the same point. He argues to this Court, in effect, that the statute under which he was tried and convicted is unconstitutional on its face, as applied, and as construed, and that the use of this unconstitutional statute as a basis for his conviction denies him the due process of law guaranteed under the Fourteenth

Amendment. Thus, if this Court chooses to reach and decide the issue of the constitutionality of *Georgia Code Ann.* §26-2105, a resolution of that issue will dispose of both of these points raised by Appellant in this Court. It is to this question that Appellee will now speak, although it does not abandon its contention that this Court should not reach this issue, but should dismiss the appeal.

Appellant contends that *Georgia Code Ann.* §26-2105, under which he was convicted of distributing obscene materials, is unconstitutional on its face, as applied, and as construed by the Georgia Supreme Court. He further contends that the utilization of this section to convict him in the trial court below denied him the due process of law. His basic argument here is that the statutory scheme under which he was convicted is vague and overbroad.

"Vagueness of a criminal law rests on the constitutional principle that procedural due process requires fair notice and proper standards for adjudication. If the scope of the power given to officials under a statute is so broad that the exercise of constitutionally protected conduct depends upon the subjective views of these officials as to the propriety of the conduct, the statute is unconstitutional as a denial of due process. . . . The concept of overbreadth of criminal laws rests on principles of substantive due process which forbid the prohibition of certain individual freedoms, the principal issue not being reasonable notice or adequate standards, though such issues may be involved, but whether the language of the statute, given its normal meaning, is so broad that its sanctions may apply to conduct protected by

the Constitution." *Gable v. Jenkins*, 309 F.Supp. 998, 1000 (N. D. Ga. 1969), *affirmed* 397 U.S. 592, 90 S.Ct. 1351, 25 L.Ed.2d 595 (1970).

Judge Morgan, in *Gable*, went on to hold *Georgia Code Ann.* §26-2101 (b) and (c) constitutional, in face of an attack on the ground that it was vague and overbroad. ". . . Section 26-2101 . . . does but two things—it prohibits the distribution of obscene materials and defines what is meant by the term 'obscene materials'. In defining this term, the statute carefully utilizes the definition of obscene materials as that term has been elucidated by the United States Supreme Court. . . . This new code section, 26-2101, is simply a more limited version of the former Georgia law, §26-6301, and has a stronger constitutional base than the former Georgia statute." *Id. See, Gornto v. State*, 227 Ga. 46 (1970).

Appellant contends that *Georgia Code Ann.* §26-2105 "imposes an absolute prohibition against exhibition of motion pictures which portray any of the acts enumerated in *Georgia Code Ann.* §26-2011. . . . This *per se* prohibition operates 'across the board,' totally without regard to whether films portraying such acts are obscene. . . . On its face, §26-2105 therefore makes no attempt to 'distinguish commerce in ideas, protected by the First Amendment, from commercial exploitation of obscene material.' " (Jurisdictional Statement, p. 11). As the Georgia Supreme Court comprehended Appellant's argument, it was that §26-2105 and the accusation were defective "in that it fails to include the definition of obscene materials as defined in *Georgia Code Ann.* §26-2101(b)." Appellant misstates the impact of *Georgia Code Ann.*

§26-2105. Basically, that section prohibits, inter alia, obscene movies in which acts which, if done live, would constitute public indecency under *Georgia Code Ann.* §26-2011. In defining acts which constitute public indecency, this latter statute utilizes the word "lewd." Save for an act of sexual intercourse, for the designated acts to constitute public indecency, they must be performed in a "lewd" manner. Thus, for §26-2105 to prohibit a movie, the acts in that movie must be "lewd" acts. The use of the word "lewd" does not make a statute unconstitutionally vague. *U.S. ex rel. Huguley v. Martin*, 325 F.Supp. 489 (N. D. Ga. 1971). In *Piercy v. State*, 92 Ga. App. 599 (1955), the Georgia Court of Appeals held that "the offense of lewdness was an indecency referable especially to sexual matters, and it included any gross indecency which was sufficiently open and notorious as to tend to corrupt the morals of the community." 92 Ga. App. at 600. Webster defines the "Obscene" as that which is "offensive to chastity or modesty." *Hawkins v. State*, 124 Ga. App. 53, 54 (1971). Lewd acts, as defined by these Georgia decisions, certainly are synonymous with obscene acts, under §26-2101(b). "There is little difference in the effect on the public between lewd conduct in public areas and lewd conduct explicitly performed on a motion picture screen for the viewing of the public." *Evans Theatre Corp. v. Slaton*, 227 Ga. 377, 381 (1971). In *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1941), this Court stated, "There are certain well-defined and narrowly limited classes of speech the prevention and punishment of which have never been thought to raise any constitutional problem. These include the *lewd*

and obscene . . ." (emphasis added). Thus even this Court has equated the lewd with the obscene.

Appellant contends that *Cohen v. California*, 403 U.S. 15 (1971) makes it clear that "public indecency" or "indecent exposure" laws may not be applied to motion pictures and other forms of expression. *Cohen* is inapposite. It involved the prohibition of "pure speech," not "communicative conduct," as is involved here. The former has always been given the highest degree of protection available under the First Amendment. Appellant also contends that *Southeastern Promotions, Ltd. v. City of Atlanta, Ga.*, 334 F. Supp. 634 (N. D. Ga. 1971) supports his position. Nowhere in that case does the Court even suggest that *Georgia Code Ann.* §26-2011 could not constitutionally be applied to the stage play "Hair." The Court does point out that the "foul words and nudity," where emphasizing a theatrical theme, are not lewd; mere nudity is not lewd. But here, the jury found that the conduct displayed was more than mere nudity—it was "lewd" nudity. "Lewd nudity" is a far cry from "mere nudity."

However, assuming, without conceding, that *Georgia Code Ann.* §26-2105 is, on its face, unconstitutionally overbroad, as Appellant contends, the limiting construction placed on the statute by the Georgia Supreme Court avoids any taint of *per se* invalidity. It has long been held by this Court to be within the power of a court to construe a statute narrowly in order to avoid the danger of unconstitutionality if this may be done in consonance with the legislative purpose of the statute. *See, American Communications Asso. v. Douds*, 339 U.S. 382, 70 S.Ct. 674, 94

L.Ed. 925, *rehearing denied*, 339 U.S. 990, 70 S.Ct. 1017, 94 L.Ed. 1391 (1949). The Georgia Supreme Court placed a very restrictive interpretation upon §26-2105. They pointed out that because *Georgia Code Ch.* 26-21 begins with the definition of obscenity in §26-2101(b) and (c), §26-2105, "which is merely a part of that chapter, must be read in accordance with the entire chapter. This court has held that sections of the Code which relate to the same subject matter shall be construed together." *Jenkins v. State*, 230 Ga. at 727. Thus, they read §26-2101 (b) and(c) into all of the code sections dealing with the control of obscenity. The title to that chapter of the *Georgia Code*, of which §26-2105 is a part, is "Distributing *Obscene* Materials" (emphasis added). Section 26-2101 defines obscenity generally, and §§26-2102 through 26-2105 proscribe and punish specific acts dealing with material which is obscene under §26-2101 (b) and (c). Even the Committee Notes which are appended to that chapter of the *Code*, and which generally express the intent of the General Assembly in enacting the chapter, state that its purpose "is to punish the distribution or exhibition of obscene materials no matter who is the disseminator or exhibitor. Thus, any medium of distribution or exhibition is covered by this section." In interpreting this chapter, the Georgia courts were bound to consider this statement of purpose. *See, Georgia Code Ann.* §102-102(a) ("In all interpretations, the courts shall look diligently for the intention of the General Assembly, keeping in view, at all times, the old law, the evil, and the remedy.") Thus, even if it is found that a motion picture exhibits conduct which violates §26-2011, the

exhibition of that motion picture cannot be prohibited unless it is also found to be obscene.

The Georgia test of obscenity has been held constitutional by this Court when it affirmed, *per curiam*, the three-judge district court decision in *Gable v. Jenkins*, *supra*. And while *Miller v. California*, ____ U.S. ____, 93 S.Ct. ____, 37 L.Ed.2d 419 (1973), adopts a test which allegedly is more restrictive of First Amendment rights, the Georgia law, until changed by the General Assembly, a possibility feared by some of the *amici*, under which Appellant was convicted was, and still remains, the *Roth-Memoirs* test. The Georgia Supreme Court, in the opinion below, acknowledged that the Georgia test was more restrictive on obscenity prosecutions. Although the states cannot grant an individual less than the constitutionally required minimum of rights, the states may grant an individual more rights, unless preempted by the federal government.

Appellant, by enumerating the "possible" interpretations which could be given to Georgia's statutory scheme, is seeking to count the number of angels which could stand on the head of a pin. The Georgia Supreme Court gave this statutory scheme, including §26-2105, the obvious, common sense meaning intended by the General Assembly. The constitutional requirement is that an individual should have fair and reasonable notice of the offense, and this scheme certainly gives fair and reasonable notice that distribution of obscene material, by whatever medium, is that which is prohibited. In *Roth v. U.S.*, 354 U.S. 476, 77 S.Ct. 304, 1 L.Ed.2d 1498 (1957), this Court stated, with regard to a question of the constitutional-

ity of the federal obscenity statute which made punishable the mailing of material that is "*obscene, lewd,* lascivious, or filthy . . . or other publication of an indecent character," (emphasis added)

> "lack of precision is not itself offensive to the requirements of due process. '. . . [T]he Constitution does not require impossible standards', all that is required is that the language 'conveys a sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. . . . These words [in the statute] applied according to the proper standards for judging obscenity . . . give adequate warning of the conduct proscribed and mark . . . boundaries sufficiently distinct for judges and juries fairly to administer the law . . .' " 354 U.S. at 491, 1 L.Ed.2d at 1511.

Under this standard, *Georgia Code Ann.* §26-2105, as construed by the Georgia Supreme Court, meets constitutional muster, and a conviction thereunder poses no substantial federal question.

Appellant also contends that even if the Georgia statutory scheme, as construed by the Georgia Supreme Court, meets constitutional muster, it cannot, as so construed, support a conviction seventeen months prior to this authoritative decision, because allegedly "[i]t would have taken 'extraordinary clairvoyance' for Appellant to have guessed . . . that the clear language of §26-2105 'really' meant what the Supreme Court of Georgia was destined to hold it means . . ." (Jurisdictional Statement, p. 19). However, the trial judge showed no "extraordinary clairvoyance," but good common sense, in correctly defining the crime with which Appellant was charged.

The instructions to the jury by the trial judge were ruled correct by the Georgia Supreme Court. After stating to the jury the statutes involved in Georgia's statutory scheme (T. 65-67), the judge correctly synthesized those statutes into the offense of Distributing Obscene Materials, with which Appellant was charged.

> "The question present with regard to the obscenity of the movie herein is not whether the particular publication depicts sex or sexual activities, but the question is whether the movie can be said to be obscene within the narrow limits as to take the movie outside of the protection of the person involved." (T. 67-68).

This is basically the common sense interpretation of the statutory scheme which the Georgia Supreme Court adopted. The question put to the jury was not simply whether or not the movie portrayed certain conduct which, if done live, would have constituted public indecency; but instead, the question was *if the movie portrayed this conduct, was the movie thereby obscene?* Quite obviously, the jury, in answering this question in the affirmative through their verdict, adopted the same common sense reading of the statutory scheme on which they were instructed and on which the Georgia Supreme Court upheld the conviction. Had Appellant actually read the statutes, and given them this same common sense reading which they demand, he would have arrived at the obvious conclusion that they prohibit obscene material such as is here involved, to wit: the movie "Carnal Knowledge." Furthermore, the Georgia Supreme Court's opinion, when read in light of the instructions which

it was upholding, was not "somewhat ambiguous," as Appellant alleges, but was crystal clear.

Appellant cites *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 89 S.Ct. 935, 22 L.Ed.2d 162 (1969) to support his argument that the later construction, by the Georgia Supreme Court, of *Georgia Code Ann.* §26-2105, which sufficiently limited the operation of the statute so as to make it constitutional, cannot suffice "to restore constitutional validity to a conviction" that occurred more than a year earlier under the statute "as it was written." *Shuttlesworth* involved a Birmingham licensing ordinance which constituted a prior restraint for the "public welfare, peace, safety, health, decency, good order, morals or convenience," on the free exercise of protected methods of expression, *e.g.*, picketing and parading, without narrow, objective, and definite standards to guide the licensing authority. It is factually distinguishable. The holding in *Shuttlesworth* was based on two points: (1) an ordinance such as the one there involved, which makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will an of official is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms. Prior to the ruling in *Shuttlesworth*, this Court had "consistently condemned licensing systems which vest in an administrative official discretion to grant or withhold a permit upon broad criteria unrelated to proper regulation of public places." 394 U.S. at 153. (2) Despite a subsequent limiting construction of the ordinance by the Alabama Supreme Court four years after the conviction, which construction this Court assumed

would result in the ordinance passing constitutional muster, the facts of the case showed that the ordinance was read and applied exactly as it was written, which resulted in an unfair, discriminatory and arbitrary decision by the licensing authority. After emphasizing these two points, this Court reversed *Shuttlesworth's* conviction. However, this case presents no basis for reversing Appellant's conviction. Unlike picketing and parading, the "lewd and obscene" are not forms of expression protected by the First Amendment. *Chaplinsky v. New Hampshire, supra.* Here there was no prior restraint placed upon Appellant's activity. Here, the District Attorney who brought the accusation against Appellant was not vested with unbridled discretion to act based on criteria unrelated to the proper regulation of the evil at which the legislation was aimed. He had to prove to a jury of Appellant's peers beyond a reasonable doubt that Appellant exhibited a motion picture, to wit: "Carnal Knowledge," which contained scenes showing (a) an act of sexual intercourse, (b) a *lewd* exposure of the sexual organs, (c) a *lewd* appearance in a state of partial or complete nudity, and (d) a *lewd* caress or indecent fondling of another person. Furthermore, he had to prove beyond a reasonable doubt that this movie was obscene, under the existing test for obscenity in Georgia. Here, the statutory scheme was narrowly construed and correctly interpreted by the trial judge in his instructions to the jury which convicted Appellant; and, as so construed and interpreted, this statutory scheme meets constitutional muster. The Georgia Supreme Court merely

adopted and explained the construction and interpretation of the trial judge.

Thus, Appellant was not denied the due process of law because the statutory scheme under which he was convicted for distributing obscene materials, §26-2105, *et. al.*, was constitutional, as construed, prior to his conviction.

III.(a)

THE ONLY ISSUE RAISED AND DECIDED REGARDING THE APPLICABLE STANDARD WAS IN REFERENCE TO THE CHARGE OF THE TRIAL COURT, WHERE THE APPELLANT CONTENDED THAT THE TRIAL COURT SHOULD HAVE CHARGED THAT *NATIONAL* COMMUNITY STANDARDS SHOULD APPLY.

Appellant contends that one question presented to this Court is

> III. Whether it is constitutionally permissible to employ "local," as opposed to statewide, contemporary community standards in evaluating the prurient interest appeal and patent offensiveness of allegedly obscene material. (Jurisdictional Statement, p. 4).

This issue is presented here for the first time by Appellant, since it was never raised in a proper and timely manner below. This issue should not, for this reason, be considered by this Court.

The given charge was couched strictly in the language of *Georgia Code Ann.* §26-2101(b):

> Material is obscene if considered as a whole, applying community standards, its predominant appeal is to the prurient interest, . . . and utterly without redeeming social value, and if, in addition, it goes substantially beyond customary limits of candor in describing or representing such matters. (T. 66).

Under Georgia law, a charge based on the language of the applicable statute is always proper. *See, Kimbrell v. State*, 57 Ga. App. 172 (1938). Clearly, under Georgia law, this charge was not erroneous.

In his Enumeration of Errors to the Georgia Supreme Court, the Appellant raised the narrow issue that the trial court erred in failing to charge that a "national" standard should be applied by the jury. He contended that the court also erred in refusing to give six separate requested charges, all of which dealt with the scope of the contemporary community, which Appellant argued was "national" and not "local." He contended that in the charge the trial court gave, the jury was left with "the clear and strong understanding that community standards will be limited to Albany and Dougherty County, Georgia, alone, and removing from the consideration of the jury the test of obscenity as applied to community standards, in the nation as a whole. . . ." Appellant contends that *Roth, Jacobellis*, and *Feldschneider v. State, infra*, dictates the use of "national" standards as opposed to "local" standards. However, as will be pointed out below, these cases are distinguishable on this point.

The court below did not determine that "local," as opposed to statewide, standards should be applied in Georgia, because that question simply was not raised.

It did determine that *Miller* "held that juries can consider *State or local* community standards in lieu of 'national' standards . . ." *Jenkins v. State*, *supra* at 728 (emphasis added). Long-standing Georgia law and federal constitutional requirements are now congruent, and because the decision below was based on independent and adequate state law grounds, which were constitutional at the time of Appellant's conviction, no substantial federal question is presented.

However, in response to Appellant's contention that it is constitutionally impermissible to employ "local" as opposed to "national," contemporary community standards in evaluating the prurient interest appeal and the patent offensiveness of allegedly obscene material, under *Georgia Code Ann.* §26-2101(b), Appellee urges that the existing constitutional law, as enunciated in *Miller*, is the first definitive ruling by this Court on the extent of the "contemporary community," and that ruling, consistent with Georgia law, is entirely proper and is controlling on this point. The fact that this Court upheld the determination of the trial court in *Miller* that the jury was to apply contemporary community standards of the State of California does not constitute a sufficient basis for requiring a decision on any such issue in the instant case. In responding to Appellant's contention, Appellee does not abandon its contention that this point was not raised below and thus should not be decided by this Court.

The question has, since *Roth*, been, what is the scope of the "contemporary community"? This Court "has not enunciated a national standard test in any

majority opinion and no combination of members . . . making up a majority have indicated approval of such a standard." *U.S. v. Groner*, 479 F. 2d 577, 582 (5th Cir. 1973). There has been no statement in any majority opinion in this Court as to the geographical scope of the term "community." Id. at 581. In *Jacobellis v. Ohio*, 378 U.S. 184, 84 S.Ct. 1676, 12 L.Ed. 2d 793 (1964), two Justices, Brennan and Goldberg, deemed community standards to mean a nationwide or national test; the community was to be "society at large" or the "people in general." The Chief Justice, joined by Justice Clark, disagreed arguing that community meant local community standards. *Id.* For this reason, the decision of the Georgia Court of Appeals in *Feldschneider v. State*, 127 Ga. App. 745, 748 (1972) cannot represent the true state of the Georgia law, and was overruled *sub silentio*, by the decision below.

The controlling standard in Georgia at the time of Appellant's conviction was enunciated in *Gornto v. State*, *supra*, at 48: "the standard to be applied is not what may or may not have been held to be obscene in other jurisdictions, but what is acceptable in the local community. The jurors represented the average members of their own community and as triers of fact, were charged with the responsibility of making such determination guided by the evidence presented and by their individual and collective awareness of the standards and norms of their community." The Fifth Circuit has also adopted the definition of "community." *U.S. v. Groner*, *supra* at p. 583: "For the trial of obscenity cases under federal law 'the community' should logically embrace that area from which the

jury is drawn and selected. . . . It does not seem reasonable or sensible to require a jury in federal criminal obscenity cases drawn from a single district or division to assess the thinking of the average person of the community, to consider the common conscience of the community, or the present-day standards of the community if the word 'community' is to include all of the people within the boundaries of this vast nation . . ." Thus, contrary to Appellant's argument on this point, the definition of "the geographic parameters and nature of the 'local' community" was crystal clear when Appellant committed the act for which he was convicted.

Furthermore, the local standard adopted by Georgia, comports with this Court's ruling in *Miller*. "To require a state to structure obscenity proceedings around evidence of a *national* 'community standard' would be an exercise in futility." When this Court's language is considered in light of the background surrounding this debate, the veil over its meaning becomes transparent.

III.(b)
THE TRIAL COURT PROPERLY CHARGED THE JURY IN THIS CASE.

Although Appellant does not raise in this Court a question regarding the charge of the trial court, thirty-eight of his forty-three enumerations of error to the Georgia Supreme Court questioned the trial judge's charges or his failure to give certain requested charges. These were the questions properly and timely raised by Appellant below, and these were questions considered and decided by the Court below.

The Georgia test of obscenity is the *Roth-Memoirs* test, enunciated by this Court and accepted as the definitive word until the *Miller* decision. The Georgia Supreme Court, in the decision below, ruled that the trial court correctly charged this definition of obscenity as the guideline for the jury to apply in this particular case. Regarding the test of obscenity, the trial court charged substantially the law contained in the requested charges. The failure to give a requested charge in the exact language of the request where the substance of the request is in fact charged is not grounds for a new trial. *See, Simmons v. State*, 226 Ga. 401, 402 (1970); *Young v. State*, 226 Ga. 553 (5) (1970); *McKinney v. State*, 121 Ga. App. 815 (3) (1970). In addition, a great majority of the requested charges on obscenity are taken directly from the language of the appellate courts. The Georgia courts have frequently held that language may be appropriate for the appellate courts while not appropriate for a charge to the jury. *See, Slater v. Dodd*, 108 Ga. App. 879, 880 (1964).

The trial judge correctly instructed the jury in the necessary interplay of the statutes involved in the statutory scheme prohibiting the distribution of obscene materials. It is clear that when a Code section incorporates a reference to another Code section, as is involved here, i.e., *Georgia Code Ann.* §§26-2105 and 26-2011, it is entirely proper, and even necessary, to charge on both code sections. For this reason, the trial court was entirely proper in charging the law of public indecency under Code §26-2011. Clearly, this charge was not only correct, but was indeed necessary so that the jury might completely understand the

statutory scheme which the defendant was charged with violating. The question which the trial court put to the jury, as was pointed out previously, was essentially that which the Georgia Supreme Court ruled proper: *If the material portrayed conduct which, if done in a public place, would have constituted public indecency, was the movie thereby obscene under the Georgia test of obscenity?*

Finally, the trial court gave an accurate and proper charge in reference to the distribution of obscene materials. This was not a charge on pandering, under *Ginzburg v. U.S.*, 383 U.S. 463 (1966), but was instead taken from *Georgia Code Ann.* §26-2101(c), and was construed by the Georgia Supreme Court to be read into the other sections of *Georgia Code Ch.* 26-21 as a definition of obscenity. It deals essentially with an added dimension that can be used in making a determination as to what constitutes obscene material.

Each question presented below which raised an issue regarding the charge of the trial court was either expressly or impliedly resolved by the court below on a non-federal basis. The decision rested on statutory construction, an adequate and independent state ground. *Murdock v. Memphis, supra.* The statutory construction is conceded to be constitutional by the Appellant, and it is binding on this Court. It presents no substantial federal question.

IV.

THE SIMPLICITY OF THE TRADITIONAL JURY SYSTEM SHOULD BE UTILIZED RATHER THAN COMPLEX APPELLATE REVIEW IN EVERY CASE.

In *Miller*, the numerous States saw the glimmer of hope in solving the hodge-podge of years of struggling to reach some order in the prosecution of obscenity cases. The Court seemed to be eliminating the non-workable inventive ideas of attorneys seeking to create a structure rather than solve the problems.

The Court in *Miller* approved the jury as the trier of fact under proper instructions. Clearly, the simplicity of the workable "reasonable man" concept in Torts and malice aforethough in the crime of murder and other similar concepts, demonstrated necessity of utilizing the traditional jury system rather than a complex appellate review in every case.

The *Miller* decision is dispositive of this issue, even if this Court decides that the question should be considered. The intent of this Court, as enunciated in *Miller*, is clear: This Court will not reverse the jury's decision on the facts—and the question raised by Appellant is one, purely and simply, of fact—except in the case of an issue of overriding national import. Any other decision by this Court, such as is urged by the Appellant, says that the trial by jury, traditionally considered to be a basic constitutional requirement in criminal prosecutions, becomes a superfluous, formal waste of the time and money of the involved parties. Furthermore, acceptance of Appellant's position by this Court is clearly an adoption by this Court of the role of final review board for all of the several thousand new and potentially questionable films released each year. Appellee urges that this Court summarily dismiss this question because it was never raised below. Unless this Court does so, Appellant's final ques-

tion should be rephrased as follows: Can any jury, properly and constitutionally instructed upon the test of obscenity, applying contemporary community standards, *ever* determine that "Carnal Knowledge" is obscene? Appellee would suggest that this has always been the role of the jury, in all cases, and that this Court never meant to suggest that this role should be anything but that attributed to the jury. To his question Appellee will now turn, but without conceding or abandoning its contention that this Court should not even reach, much less decide, the issue.

In First Amendment cases, it is settled that an appellate court must make an independent constitutional judgment on the facts and the quantum of proof of the case in order to insure that if the material is constitutionally protected, vital First Amendment rights are not discarded. *Jacobellis v. Ohio*, 378 U.S. at 190, 12 L.Ed.2d at 799. But what is the extent of this review? In the habeas corpus proceedings which followed the affirmance of the *Gornto* case, *Gornto v. McDougall*, 336 F.Supp. 1372 (S. D. Ga. 1972), Chief Judge Lawrence stated:

> "Yet everything up to that point [i.e., the consideration, on application for certiorari, by this Court of the *Gornto* case] is but idle show, a spinning of judicial wheels. All that has been accomplished so far is to make a record in the trial court upon which the federal courts will on habeas corpus application render a *de novo*, apodictic judgment as to obscenity and First Amendment protection. And when I say federal courts I mean three separate levels of the judiciary— . . . each deciding for itself, according to its own light the matter of obscenity *vel non*.

> "There is a wonderlandish, Oz-like quality about the whole thing. The function of federal courts in these cases is a bewildering anomaly. Do they review the trial court record and determine whether or not the publication is obscene as a matter of law? Or do they determine such as a matter of fact and as though they were jurors? Does the verdict of a state jury finding a publication to be obscene under proper instructions carry any weight at all?"

336 F.Supp. at 1376.

In *U.S. v. A Motion Picture Film*, 404 F.2d 196 (2nd Cir. 1968), Chief Judge Lumbard, in his dissenting opinion, stated, "[T]he majority would take away from the jury the power to pass on these not too difficult and complicated questions by saying that obscenity is 'an issue of constitutional law' rather than an issue of fact with respect to which the jury's finding has its usual conclusive effect." 404 F.2d at 203, 204.

This Court, in *Miller*, stated that the standards of precisely what appeals to the prurient interest or is patently offensive are essentially questions of fact. "When triers of fact are asked to decide whether 'the average person, applying contemporary community standards' would consider certain materials 'prurient,' it would be unrealistic to require that the answer be based on some abstract formulation. The adversary system, with lay jurors as the usual ultimate fact finders in criminal prosecutions, has historically permitted triers-of-fact to draw on the standards of this community, guided always by limiting instructions on the law" _____ U.S. _____, 37 L.Ed.2d at 434. Thus,

the determination of the "contemporary community standards" is a question of fact, not of constitutional law, and, save for some constitutional infirmity in the law applied, the jury's decision, being the ultimate and binding arbitration of the fact, and application of the law thereto, is not to be overruled based on the appellate court's motion of some abstract, metaphysical amorphous "national standard". Clearly, it was never intended that the appellate courts should supersede the jury in its capacity as fact finder. And yet this has been the result of the application of "national standards". The *Miller* decision resolved this "bewildering anomaly," and returned the decision of the jury to its rightful position in obscenity cases. Obviously, within our adversary legal system, wherein juries are the traditional finders of fact, local or state standards are the only logical criteria. Application of the alternative system of national standards in the manner previously utilized, to overrule the jury's decision as to what is obscene, merely casts doubts on the value of the jury system.

Because Georgia law required the use of other standards in 1972 when Appellant was convicted, and as this has now been held to be constitutionally permissible under the First Amendment, in the *Miller* case, the decision of the jury finding "Carnal Knowledge" obscene should not be disturbed. Save for errors of constitutional magnitude in the trial and instructions, the decision of the jury in this case, applying contemporary community standards to the movie finding it obscene is a decision of fact, and should not be disturbed.

CONCLUSION

For the foregoing reasons, the decision of the court below should not be disturbed.

Respectfully submitted,

TONY H. HIGHT
Counsel for Appellee

CERTIFICATE OF SERVICE

GEORGIA, FULTON COUNTY

I, Tony H. Hight, of Counsel for the State of Georgia, Appellee in the foregoing case, certify that I have this day served a copy of the foregoing motion to dismiss or affirm upon Appellant, by depositing in the United States Post Office in Atlanta, Georgia, a copy of the same in separate envelopes addressed to: Tenche C. Cox, 1500 Candler Building, Atlanta, Georgia 30303; Louis Nizer, 477 Madison Avenue, New York, New York 10022; James Bouras, 522 Fifth Avenue, New York, New York 10036, attorneys for Appellant, with sufficient postage affixed thereto.

This _____ day of February, 1974.

TONY H. HIGHT
Counsel for Appellee

IN THE

Supreme Court of the United States

COPY

October Term, 1973
No. 73-557

Supreme Court, U. S.
FILED
MAR 14 1974
MICHAEL RODAK, JR., CLERK

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BILLY JENKINS,

Appellant,

vs.

STATE OF GEORGIA,

Appellee.

On Appeal From the Supreme Court of Georgia.

Brief Amicus Curiae of Charles H. Keating, Jr. in Support of Appellee

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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-557

BILLY JENKINS,

Appellant,

vs.

STATE OF GEORGIA,

Appellee.

On Appeal From the Supreme Court of Georgia.

BRIEF AMICUS CURIAE OF CHARLES H. KEATING, JR., IN SUPPORT OF APPELLEE

INTEREST OF AMICUS CURIAE

Charles H. Keating, Jr., has a special interest in the general subject of this appeal, having devoted considerable time, money, and effort to assisting law enforcement in combating the spread of obscenity in the Nation; first, as the founder and co-counsel for CDL,[1] and more recently as a member of the Presidential Commission on Obscenity and Pornography.

[1] Citizens for Decent Literature, Inc., now Citizens for Decency Through Law.

Amicus also has a particular interest in the film "Carnal Knowledge" which is the subject of this appeal, having provided legal assistance to the Commonwealth Attorney for the 19th Judicial District of Kentucky in an obscenity case arising out of its exhibition in Maysville, Kentucky.[2] The criminal case in Maysville, Ky., was later compromised with a plea of nolo contendere and a fine of $400. A civil action filed by the Commonwealth Attorney of Maysville, Ky., as Plaintiff, to abate the film "Carnal Knowledge" as a public nuisance, and grounded upon the same evidentiary facts which caused the lodging of the criminal charge in the first instance, was dismissed for lack of prosecution due to the Commonwealth Attorney's inability to serve out-of-state defendants.[3]

Amicus' primary interest in filing this Brief Amicus Curiae is not so much rooted to the abovementioned general concern over the status of the obscenity laws of this Nation, or the merits and infirmities of the specific film "Carnal Knowledge," as it is to Amicus' concern that this Court should have laid before it, in a chronological fashion, the

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[2] The Commonwealth Attorney's letter of Oct. 19, 1971, requested advice and assistance. (See copy of letter at Appendix C, page 3). By way of reply, amicus assigned a group of attorneys to provide services as required (see copy of letter at Appendix C, page 4, which services, as performed, encompassed the preparation of the continuity on "Carnal Knowledge," which appears hereinafter at Appendix A, pages 3 to 84 and the Time-Motion Study at Appendix B, pages 3 to 25.

---

[3] The Commonwealth Attorney filed a civil action to abate the film "Carnal Knowledge" as a public nuisance, naming as defendants, out-of-state producers, distributors, etc., including Joseph E. Levine, c/o AVCO Embassy Pictures Corporation, 1301 Sixth Ave., N.Y., NY; Michael Nichols, 1 West 81st Street, N.Y., NY; AVCO Embassy Pictures Corp., a Delaware Corp. c/o Statutory Agent Corporation Trust Co., 277 Park Ave., N.Y., NY.; Motion Pictures Ass'n of America, Inc., c/o General Counsel Sidney Schreiber, 522 Fifth Ave., N.Y., NY; and UCI & IV Corp., a New York Corp., c/o David Stein, 1271 Avenue of the Americas, Room 670, N.Y., NY. In a letter dated March 7, 1973, (See copy at Appendix C, pages 5-6) the Commonwealth Attorney advised Amicus that the criminal case was being compromised on a plea of nolo contendere and a fine of $400.00, and that the civil action was being dismissed under a local rule due to an inability to effect service of process on the out-of-state defendants.

legislative history for Georgia Code Section 26-2105 under attack herein, and the historical facts which provide the background for the criminal conviction which is the subject of this Court's review. Such information came to Amicus' attention in connection with a contract for legal services entered into between the Board of Commissioners of Fulton County and the law firm of Keating, Clancy, Bertsch, and Johnston, (see copy of contract at Appendix D, pages 3 and 4) of which Amicus was a member, wherein the latter firm of attorneys provided Fulton County, Georgia (Atlanta) with special legal services by way of investigation, preparation, and prosecution of obscenity matters, from October 1, 1970 through March, 1971. Those background historical facts appear hereinafter as a part of the "Statement of Facts."

Amicus is satisfied that this Court, given a complete understanding of: (1) the background history to the challenged legislation and, (2) the complete facts which surround the criminal charge and this conviction, will recognize that this case, in a fortuitous fashion, carries with it the solution which will lead this Court out of the wilderness in which it finds itself at the present time in the area of motion picture films. The Georgia Supreme Court's ruling in *Jenkins v. Georgia* 230 Ga. 726, 199 S.E. 2d 183 (Mar 4, 1972) incorporates the very principles espoused by a majority of this Court in its recent obscenity decisions in *Paris Adult Theatre I v. Slaton* 413 U.S. 49 and companion cases on June 21, 1973, and, in fact, further implements those decisions.[4]

[4] Amicus is aware that there are a substantial number of commentators on the American scene who feel that this Court (a) has noted jurisdiction of this case for the specific purpose of placing a limitation on the law expressed in the June 21, 1973, majority decisions (Paris Adult Theatre I v. Slaton, 413 US 49, 37 L.Ed.2d 446, 93 S.Ct.—, et al.) and (b) will reverse the conviction herein. Those expectations, however, where not grounded in a special interest, are superficial assessments made without knowledge of the complete historical facts and the interaction of such facts with the basic gut issue which is created when explicit sexual conduct is depicted on the motion picture screens in any community. As to the latter type of judgment see, in particular, the comments of Professor Alexander M. Bickel on the "Carnal Knowledge" case in his February Reader's Digest article at pp. 116-117.

STATEMENT OF FACTS

INTRODUCTION

The conviction of Jenkins for exhibiting an obscene motion picture film under the specific charge which was read to the jury was *not* the result of chance. Rather, it was the climax to a series of independent, yet integrated and related courses of action undertaken by each of the three separate branches of state government in Georgia - administrative, judicial, and legislative - in that State's determination to outlaw the public depiction of explicit sexual conduct on the motion picture screens in the local communities. That such is a proper area of concern for state government is beyond question. See *Paris Adult Theatre I v. Slaton*, 413 US 49, 37 L.Ed.2d 446 at 458, 459, 93 S.Ct.__(June 21, 1973). That specific objective served as the wellspring for the majority opinions handed down by this Court in the companion obscenity cases on June 21, 1973.

The administration and development of the obscenity law in the Georgia Courts during 1970-1971, together with the action taken by the Georgia Legislature during the period 1970-1971, as explicated hereinafter under the subheading "Statutory Background," clearly demonstrates that on January 13, 1972, Appellant Jenkins had fair notice of what was regarded as criminal conduct when he exhibited "Carnal Knowledge" at the Broad Avenue Cinema in Albany, Georgia. Cf *Rabe v. Washington*, 405 US 313, 31 L.Ed.2d 258, 261, 92 S.Ct. 993 (Mar. 20, 1972). The charging language of the March 6, 1972, Grand Jury indictment itself was quite specific, and was anything but vague. (J.A.8)

Further, Jenkins was *not* an innocent victim, nor is this a case where lack of evidence on the issue of scienter can be urged in the conference room of this Court as a "visceral" grounds for refusing to affirm the conviction. See "Statement of the Case" infra. at page 16. Jenkins exhibited "Carnal Knowledge" with actual knowledge that, four months earlier, the district attorney, as the representative of the administrative branch of government had presented a successful

courtroom challenge to the exhibition of "Carnal Knowledge" at another theater in Albany, Georgia,[5] and was continuing to do so under the combined authority of: (1) a judicial rule of law handed down by the Georgia Supreme Court on Mar. 4, 1971, in *Evans Theatre Corp. v. Slaton*, 230 Ga. 726 180 SE 2d 712 and, (2) a newly enacted statute, Georgia Code Section 26-2105 (b), which became effective on April 1, 1971.

The specific purpose of the 1971 legislation (Georgia Code Sect. 26-2105(b)) was to proscribe the depiction on the motion picture screen of that type of explicit sexual conduct which, if engaged in in public, would amount to "Public Indecency" under Georgia's "common decency" statute. Such legislation was nothing less than a codification of the judicial rule of law followed by both the Fulton County Trial Court in October of 1970 and by the Georgia Supreme Court on Mar. 4, 1971, in the well-publicized "I Am Curious (Yellow)" case (which proscribed similar explicit sexual conduct in that film). See *Evans Theatre Corp., Inc. v. Slaton*, 227 Ga. 377, 180 SE 2d 712, where the Georgia Supreme Court held, at page 715:

> "The Criminal Code of Georgia makes penal a lewd performance in public, including an act of sexual intercourse and a lewd appearance in a state of nudity. Code

---

[5] See Trial Court Reporter's Transcript (herein referred to as R.T.) on file with this Court as a part of the Record in the Supreme Court of Georgia (as noted in Appellant's Brief at page 8, footnote 7, but not included as a part of the printed Joint Appendix on appeal). The fact that the exhibition had previously been challenged at the Martin Theater was the subject of a stipulation by defense counsel Geer; (R.T. 53).

Q. Now, do you recall whether or not in October Carnal Knowledge was seized from the Martin Theater?

A. Yes, I drew up the search warrant after viewing the film.

Q. Do you know whether or not some time after that the Martin Theater agreed not to show the film unless there was a judicial determination?

A. It would be hearsay.

MR. GEER: I will stipulate that I recall the agreement, Your Honor, and it was admitted and will stipulate to it.

THE COURT: Let the record so indicate.

MR. REYNOLDS: That's all.

> Ann. § 26-2011 (Ga. L. 1968, pp. 1249, 1301). Such acts are prohibited, not because of the injury inflicted on other individuals, as in the case of murder or robbery, but because the acts are offensive to the majority of the people. If any semblance of civilization is retained in our country, the States must have standards of conduct permissible in public. '*There is little difference in the effect on the public between lewd conduct in public areas and lewd conduct explicitly performed on a motion picture screen for the viewing of the public.*'" (Our emphasis)

In November of 1971, this Court refused to hear an attack on that rule of law. See *Evans Theatre Corp. et al v. Slaton*, petition for certiorari denied in 404 US 950, 30 L.Ed 2d, 267, 92S.Ct 281 (Nov. 9, 1971).

This Court now has before it on review a second decision of the highest Court of the State of Georgia which: (1) affirms the facial validity of the Judicial Rule of Law expressed in the Evans Theatre Corp. case as now codified in 1971 by Georgia Code Ann. Section 26-2105, and which (2) upholds the validity of that statute as applied by both the jury and the Court to an exhibition of the film "Carnal Knowledge" by Bill Jenkins at the Broad Avenue Cinema in Albany, Georgia.

Section 26-2105(b) provides in relevant part as follows:

> "(b) Every person who. . . knowingly exhibits . . .a motion picture. . .containing such conduct (conduct which would be public indecency under section 26-2011 if performed in a public place) . . .shall be guilty of a misdemeanor. . . ."

The term "conduct" which would be public indecency is *specifically* defined[6] as:

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[6] See Miller v. California, 413 US 15, 37 L.Ed.2d 419, 431, 93 S.Ct. 2607 (June 21, 1973) where this Court said:

> "The basic guidelines for the trier of fact must be:. . (b) whether the work depicts. . ., in a patently offensive way, sexual conduct specificially defined by the applicable state laws. . ." (Our emphasis.)

In his recitation of "Statutory Background" at page 5, Appellant fails to point out that the purpose of the 1968 amendment which created section 26-2011 was "to substitute explicit conduct which falls within its proscriptions for the rather vague 'tending to debauch

(a) an act of sexual intercourse;
(b) a lewd exposure of the sexual organs;
(c) a lewd appearance in a state of partial or complete nudity;
(d) a lewd caress or indecent fondling of the body of another person.

In ruling that Section 26-2105 was facially valid, the Georgia Supreme Court applied the "pari materia" rule of statutory construction. See *Jenkins v. Georgia*, 199 SE2 183 at 184.

> "It is our view that a statute can provide criminal punishment without the definition of obscenity being included within that specific code section. The chapter in which Code Ann. § 26-2105 is included at its very beginning amply defines obscenity *and this particular Code section, which is merely a part of the chapter, must be read in accordance with the entire chapter.* This court has held that sections of the code which relate to the same subject matter shall be construed together. See *Touchton v. Echols County*, 211 Ga. 85, 87, 84 SE2d 81. It seems clear then that the definition of obscenity as set forth in the chapter applies to all of the code sections dealing with this same question." (Our emphasis.)

In view of the fact that the constitutionality of Georgia Code Ann Section 26-2105 is dependent upon a proper application of the "pari materia" rule of statutory construction, it necessarily follows therefrom that this Court, must review the contemporary historical facts and legislative intent which formed the background for the entire legislative scheme. Further, this Court must place itself in the stead of the Georgia Supreme Court, where it can consider that Court's

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the morals' formerly employed." See Committee Notes to Chapter 26-20 at page 153:

> "26-2011. Public Indecency. - This section substantially restates former § 26-6101, relating to lewdness and public indecency. It substitutes explicit conduct which falls within its proscriptions for the rather vague "tending to debauch the morals" formerly employed. The definition of public place is in line with the "open" lewdness and "notorious" act of public indecency terms of the former statute. The punishment contains no change."

By the terms of the statute, the four specifically defined types of sexual conduct are by definition "patently offensive" as a matter of law.

entire experience in this area of the law, including the Georgia Court's knowledge of prior obscenity litigation and what, as a matter of fact, was and is being introduced onto the motion picture screens of the theaters in Georgia. [7]

A. Statutory Background

On March 21, 1966, this Court handed down its majority decisions in *Mishkin v. New York*, 383 US 502, 16 L. Ed. 2d 56, 86 S. Ct. 958 and *Ginzburg v. U.S.* 383 US 463, 16 L. Ed.2d 31, 86 S. Ct. 942 and its no-clear majority decision (plurality result) in *Memoirs of a Woman of Pleasure v. Attorney General of Massachusetts, 383* US 413, 16 L.Ed.2d 86 S. Ct. 975. Two years later, the Georgia Legislature, in its determination to assure the constitutionality of the Georgia obscenity laws, enacted Georgia Laws 1968, pp. 1249, 1302, which became effective on July 1, 1969, as Georgia Code Ann., Section 26-2101. (See Appendix E at p. 3.) Those sections of the Georgia Laws codified the minority opinion of Justices Brennan, Warren and Fortas in *Memoirs, supra* (since discredited and specifically abandoned in *Miller v. Calif.* 413 US 15, 37 L.Ed.2d 419, 430, 93 S.Ct. (June 21, 1973),) and the rule of law expressed in *Ginzburg v. U.S. supra.* Such sections were operative on the date of the alleged offense herein, Jan 13, 1972. Section 26-2101(b) defines obscenity in terms of a tripartite test as used in the minority opinion of Justices Brennan, Warren and Fortas in *Memoirs, supra.* Sec. 26-2101 (c) codified the rule of law expressed in *Ginzburg v. US., supra* at p. 41, namely, that:

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[7] Phrased differently, it would be quite unfair for this Court, in exercising its "independent constitutional judgment" to weigh in the balance factors not within the confines of the record being reviewed, which might tend to upset the lower court's judgment, while not also considering in the balance trial facts which were not made a part of the joint appendix or other factors which are within the knowledge of the State Court Judiciary, yet which may not be a part of the formal record on review.

"Where an exploitation of interests in titilation by pornography is shown with respect to material lending itself to such exploitation through pervasive treatment or description of sexual matters, such evidence may support the determination that the material is obscene even though in other contexts the material would escape such condemnation . . . ."

1. The Legal Problem as Viewed by State Government.

Following the pattern established in other states, the codification of Justice Brennan's tri-partite minority test in *Memoirs* as a part of Georgia law accelerated the slow deterioration which had been taking place in obscenity law enforcement during the past decade. To compound the problem, other issues surfaced and combined to cast a plague upon law enforcement, such as (1) the "prior adversary hearing" issue, put to rest in *Heller v. N.Y.*, 413 US 483, 37 L.Ed.2d 745, 93 S.Ct. 2789, and *Roaden v. Ky.*, 413 US 496, 37 L.Ed.2d 757, 93 S.Ct. 2796 (June 25, 1973); (2) the alleged constitutional right of consenting adults to view obscenity in a closed theater arising out of *Stanley v. Georgia*, 394 US 557, 22 L.Ed.2d 542, 89 S. Ct. 1243 (Apr. 7, 1969) and put to rest in *Paris Adult Theatre I v. Slaton*, 413 US 49, 37 L.Ed.2d 446, 456, 93 S.Ct. 2628 (June 21, 1973); (3) whether *Redrup v. New York*, 386 US 767, 18 L.Ed.2d 515, 87 S.Ct. 1414 (May 8, 1967) was to be regarded as a binding constitutional precedent, decided in the negative and put to rest in *Miller v. Calif.*, 413 US 15, 37 L.Ed2d 419, 429 fn.3, 434, 93 S.Ct. 2607 (June 21, 1973); and (4) whether national standards were mandated by the no-clear majority, (plurality result) minority opinion of Justices Brennan and Goldberg in *Jacobellis v. Ohio*, 378 US 184, 12 L.Ed2d 793, 84 S.Ct. 1676 (June 22, 1964), decided in the negative and put to rest in *Miller v. Calif.*, 413 US 15, 37 L.Ed.2d 419 at 436, 438, 93 S.Ct. 2607 (June 21, 1973).

The plague of legal issues described above made it impossible for any prosecutor or municipal attorney to ef-

fectively carry out his law enforcement duties with his regular staff of attorneys. Whenever law enforcement would commence a civil or criminal case in the state courts, the defense, with an unlimited supply of litigation funds generated from the industry's profits, would engage law enforcement on two fronts by carrying the action to the federal courts, which were more favorably inclined toward listening to the federal claims. A Georgia case which documents this unequal struggle is *Central Agency, Inc. v. Brown and McAuliffe, et al.*, 306 F. Supp. 502 (Aug. 26, 1969). There, Hinson McAuliffe, as Solicitor General of the Criminal Courts of Fulton County, Georgia (Atlanta) obtained a search warrant from the Superior Court of Fulton County and on Aug. 13, 1967, pursuant to that authority, seized the film "The Yellow Bird" which was being publicly exhibited at the Central Theater, 104 Whitehall Street, S.W., in Atlanta, Georgia. The search warrant process had been used to obtain the film as evidence for presentation to the grand jury of Fulton County for possible obscenity indictments against persons or corporations responsible for the public exhibition. Instead of contesting the legality of the seizure under the search warrant in the state court, the defense moved into the Federal Court where Federal District Judge Henderson accepted jurisdiction of an original federal lawsuit seeking injunctive relief, and ruled that the state search warrant procedure was constitutionally deficient and that any seizure must be preceded by a state court finding of obscenity in an adversary judicial hearing.

2. The Administrative Answer Given By Fulton County Solicitor-General Hinson McAuliffe.

Faced with the vexatious problems noted above, Solicitor-General McAuliffe obtained authorization from the Board of Commissioners of Fulton County to employ outside counsel to assist him in the investigation, preparation, and prosecution of obscenity matters for the Solicitor General's office. Thereafter McAuliffe entered into a contract with the firm of Keating, Clancy, Bertsch and Johnston, of which Amicus was a member for special legal services from Oct. 1, 1970 -

Mar. 31, 1971 (See Appendix D, pages 3 and 4 and "Interest of Amicus Curiae" *supra*, at page 3). It was agreed at the outset that law enforcement efforts would be concentrated on the motion picture problem in Atlanta, Georgia (which was overrun with hard-core pornography). From this alliance to achieve effective obscenity law enforcement, emerged the starting point in the statutory history of Georgia Code Section 26-2105.

3. **The Judicial Answer in the "I Am Curious (Yellow)" Case - Proscription by Judicial Rule of Law (Civil Injunction against a Public Nuisance).**

At the outset of this program, Hinson McAuliffe, as Solicitor-General of the Criminal Courts of Fulton County, commenced an action in concert with Lewis R. Slaton, the District Attorney of Fulton County, entitled *Lewis R. Slaton and Hinson McAuliffe v. Evans Theater Corp., Inc. dba Loews Grand Theater, et al.*, No. B 59034, in the Superior Court for the County of Fulton seeking an injunction against the exhibition of the motion picture film "I Am Curious (Yellow)" at the Loews Theater. An understanding of the arguments in the "I Am Curious (Yellow)" case is central to an understanding of the statutory history of the Georgia Code Section 26-2105 under attack herein, for it was in that case that the argument was *first* made, in the Georgia State Court system, for the adoption of a *judicial rule of law*, patterned after the reasoning in Justice Burke's majority opinion in *Trans-Lux Distributing Corp. v. Board of Regents*, 248 NYS 2d 857 (Mar. 26, 1964).[8] Solicitor-General McAuliffe's arguments to the Fulton County Superior Court Judge Shaw in the "I Am Curious Yellow" case were, that if a public act of sodomy in three dimension is a violation of the public policy of the state, being in violation of specific laws which

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[8] Justice Burke's majority opinion in Trans-Lux Distributing Corp. v. Bd. of Regents is discussed hereinafter at page 45 infra. Justice Burke's opinion was derived from Associate Justice Tom C. Clark's concurring opinion in Kingsley International Pictures Corp. v. Regent 360 US 684, 3L.Ed.2d 1512, 1524, 79 S.Ct. 1362 (June 29, 1959).

are designed to proscribe explicit sexual conduct in public, then the public display of such acts, real or simulated, in two dimension by way of motion picture films is *per se* contrary to the same public policy and in violation of the obscenity laws as a matter of law (being a violation of stated community standards). The only evidence offered by plaintiffs in support of the preliminary injunction was the film "I Am Curious (Yellow)" which Superior Court Judge Shaw viewed at the Loew's Theater on Oct. 2, 1970.

In defending against the adoption of the abovementioned *judicial rule of law*, defense counsel in the "I Am Curious (Yellow)" case argued that, if this were so, then the motion picture presentation of simulated murder would be illegal. Solicitor-General McAuliffe's reply pointed out that the argument offered by the opposition was a non sequitur for, while there is no stated law or public policy which prohibits the pictorial portrayal of simulated murder, there is on the other hand, an almost universally recognized law and public policy in civilized societies which prohibits the pictorial portrayal of indecent public conduct, and that is the laws against lewdness.[9]

Upon the conclusion of arguments in the trial court, Superior Court Judge Shaw granted the preliminary injunction and enjoined the showing of "I Am Curious (Yellow)" in Atlanta. On appeal, the Georgia Supreme Court agreed with Solicitor-General McAuliffe's arguments, and *adopted as a judicial rule of law in Georgia*, what is essentially the rationale expressed by *Justice Burke in Trans-Lux Distributing Corp. v. Board of Regents, supra*, discussed hereinafter at page 45. See *Evans Theatre Corp. v. Slaton* 227 Ga. 377,

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[9] Justice Burke's eloquent reply in Trans-Lux Distributing Corp. v. Board of Regents, supra, was at page 863:

> "To all argument predicated on artistic merit as decisive of the constitutional question, it is sufficient answer to say that artists are not such favorites of the law that they may ply their craft in the teeth of a declared over-riding public policy against pornographic displays. Since no other profession is privileged to bend public morals, policy and law to its internal craft standards, then neither should producers of films."

180 S.E.2d 712 (Mar 4, 1971) where the Georgia Supreme Court held at page 715:

"The Criminal Code of Georgia makes penal a lewd performance in public, including an act of sexual intercourse and a lewd appearance in a state of nudity. Code Ann. § 26-2011 (Ga. L. 1968, pp. 1249, 1301). Such acts are prohibited, not because of the injury inflicted on other individuals, as in the case of murder or robbery but because the acts are offensive to the majority of the people. If any semblance of civilization is retained in our country, the States must have standards of conduct permissible in public. There is little difference in the effect on the public between lewd conduct in public areas and lewd conduct explicitly performed on a motion picture screen for the viewing of the public."

4. The Legislative Answer - A Confirmation of the Judicial Rule of Law Expressed in the "I Am Curious (Yellow)" case plus Statutory Enactment of Criminal Sanctions.

During the course of the first three months of the legal services contract, several interested citizens and legislators approached Hinson McAuliffe for advice as to obscenity legislation which would compliment the Solicitor-General's efforts in the courtroom. While the advice of special counsel was that it would be inadvisable to effect new legislation at a time when test cases, under existing laws, were being processed against the industry, a copy of a CDL Model Obscenity Statute (see copy at Appendix F, at pp. 3-8), and comments thereon (see copy at Appendix G at pp. 3-16) [10], drafted by attorneys in the firm of Keating, Clancy, Bertsch and

[10] In February of 1971, Solicitor General Hinson McAuliffe had filed with the Georgia Supreme Court a copy of the CDL Model Obscenity Statute (See Appendix F) and a copy of the comments thereon (see Appendix G) as appendices E and F to Appellee's Supplemental Brief in Evans Theatre Corp. dba Loew's Grand Theater v. Lewis R. Slaton and Hinson McAuliffe No. 26,249.

Johnston in March of 1969, was made available to the legislators through Solicitor-General McAuliffe.

Thereafter, Senators Garrand of the 37th District and Walling of the 42nd District filed the major provisions of the abovementioned CDL Model Obscenity Statute as Senate Bill 108. CDL Model Obscenity Statute, Sections 1 through 12, were offered as proposed Georgia Code Annotated Sections 25-2101 through 26-2112. CDL Model Obscenity Statute, Sections 17, 18, 19, 20 and 22 were offered as proposed Georgia Code Sections 26-1113 through 26-2117. CDL Obscenity Statute, Sections 13, 14, 15, 16 and 21 were the only provisions omitted from Senate Bill 108 as originally filed. See copy of Senate Bill 108 as originally filed, at Appendix H, pp. 3-13, and compare the same with the CDL Model Obscenity Statute Appendix F at pp. 3-8. On Jan. 22, 1971, Senate Bill 108, had its first reading in the Senate.

Before Senate Bill 108 was passed to its second reading, advice was sought from Solicitor-General McAuliffe and special counsel as to which provisions of the CDL Model Obscenity Statute were regarded as being of the greatest value in the courtroom struggle. At the time, a recommendation was made by special counsel that, in view of the pending arguments being made in the State Court, legislative codification of CDL's Model Obscenity Statute, Sections 1(a) (public nuisance), 10 (lewd conduct, etc., on the screen, etc.), and 18(a) (contraband) would be of the greatest value. Thereafter, on Mar. 4, 1971, the Senate Committee on the Judiciary offered a substitute bill to Senate Bill 108 (see copy at Appendix I, pp. 3-8) which deleted most of the sections of the CDL Model Obscenity Statute but retained Sections 1(a) (public nuisance), 10 (lewd conduct, etc., on the screen, etc.), and 18(a) (contraband), as proposed Georgia Code Sections 26-2103, 26-2104 and 26-2105. In addition, the CDL scienter provision (Sect. 1(f)) was slightly modified and retained as part of the proposed Georgia Code Section 26-2601(a) as thus amended. Substitute Senate Bill 108 was read for the second time on Mar. 4, 1971, and for the third time on Mar. 5, 1971, at which time it passed the Senate by a 29 to 0 vote. (See Appendix I, at p. 11.)

Substitute Senate Bill 108 was read for the first time in the House on Mar. 5, 1971, for the second time on Mar. 6, 1971, and for the third time on Mar. 9, 1971, at which time it passed the House by a vote of 104-to-4. (See Appendix I, at pp. 11.)

On April 1, 1971, Senate Bill 108 was signed by the Governor of the State of Georgia and became law on that date. (See Appendix J at pp. 3-9.)

Since Georgia Code Section 26-2105 was derived from Section 10 of the CDL Model Obscenity Statute the intent of the Legislature becomes clear beyond doubt. See Comments to the CDL Model Obscenity Statute, at Appendix G, pp. 3-16. Clearly, the intent of the Legislature was to codify the rational applied by Mr. Justice Tom C. Clark in his concurring opinion in *Kingsley International Pictures Corp. v. Regents*, 360 US 684, 79 S.Ct. 1362, 3 L.Ed.2d 1512 (June 29, 1959) at 1524:

> "It may be, as Chief Judge Conway said, 'that our public morality, possibly more than ever before, needs every protection government can give.' 4 NY2d at 363, 151 NE2d 204, 205, 175 NYS2d at 50. And, as my Brother Harlan points out, 'each time such a statute is struck down, the State is left in more confusion.' This is true where broad grounds are employed leaving no indication as to what may be necessary to meet the requirement of due process. *I see no grounds for confusion, however, were a statute to ban 'pornographic' films, or those that 'portray acts of sexual immorality, perversion or lewdness.' If New York's statute had been so construed by its highest court I believe it would have met the requirement of due process.* Instead, it placed more emphasis on what the film teaches than on what it depicts. There is where the confusion enters. For this reason, I would reverse on the authority of Burstyn." (Emphasis ours.)

Justice Clark's opinion was more analytically considered by Judge Burke, speaking for the majority of the New York Court of Appeal in *Trans-Lux Distributing Corp. v. Board of Regents*, 248 NYS 2d 857 (Mar. 26, 2964), see infra at page 45.

B. STATEMENT OF THE CASE

INTRODUCTION

Contrary to what this Court might be led to believe from Appellant's Statement of Facts (pages 5-7), the legal dispute which the Dougherty County District Attorney had (1) with the type of film which was regularly being exhibited at Jenkins' Broad Avenue Cinema and (2) with Jenkins' exhibition of the film "Carnal Knowledge" at the Broad Avenue Cinema *did not begin* with Jenkins' exhibition of "Carnal Knowledge" at the Broad Avenue Cinema on January 13, 1972. It began many months before that date.

1. The Dougherty County District Attorney Gives Written Notice To The Theaters in May of 1971 of His Intention to Enforce Georgia Code Section 26-2105.

The Georgia Supreme Court having announced the above mentioned judicial rule of law on Mar. 4, 1971, in *Evans Theatre Corp. v. Slayton*, and the Georgia legislature having codified that rule of law in Georgia Code Section 26-2105 (effective on April 1, 1971 upon signature by the Governor) the Dougherty County District Attorney committed himself to enforcing the same, and gave written notice of his intentions to the operators of the local theaters. On May 13, 1971, a news article appeared in the Albany Herald, a copy of which is enclosed herein at Appendix K page 3, announcing that the District Attorney had sent all local theaters the following letter:

> "Pursuant to the instructions of the May 1971 grand jury, I intend to enforce the laws which go into effect on July 1, 1971. I am enclosing a copy of these laws which go into effect July 1, 1971."

2. The District Attorney's Attempt by Civil Process to Stop Jenkins' Conduct as to Other Movies is Frustrated by Defense Attorney Tactics and Federal Interference.

In the face of such notice, Appellant Jenkins herein, as

president of S.W.J. Inc. dba as Broad Avenue Cinema, (See Appendix L page 10) continued to exhibit films which, in District Attorney Reynolds' judgment were in violation of the law. Thereupon, the District Attorney on Aug. 16, 1971, filed a civil action against the Broad Avenue Cinema Theater entitled *Robert W. Reynolds, District Attorney v. S.W.J. Inc.*, Civil Action No. 7296, in the Superior Court for the County of Dougherty, alleging a public nuisance and seeking an injunction against the theater based upon the showing of several films at that theater, such as, "Midnight Plowboy" (July 4, 1971), "The Ravager" (July 14, 1971), "Sweet Bird of Aquarius" (July 12, 1971), "Southern Comfort" (July 22, 1971), and "Tobacco Roody" (July 22, 1971). A copy of the Summons and Complaint in *Robert W. Reynolds, District Attorney v. S.W.J. Inc.*, is attached hereto at Appendix L, pages 3-6.

At the time of filing of the above civil action, District Attorney Reynolds obtained a court order directing S.W.J. Inc. to show cause on Aug. 23, 1971, why the theater should not be temporarily restrained from the continuance of such nuisance. (A copy of such Order appears at Appendix L, page 6.) On Aug. 19, 1971, Appellant Billy R. Jenkins, herein filed a verified answer as president of S.W.J. Inc. dba as Broad Avenue Cinema. (A copy of said Answer appears herein at Appendix L, pages 7-10.)

On Friday, Aug. 20, 1971, one court day before the hearing date on the injunction in the State Court action, (Monday, Aug. 23, 1971) Peter Zack Geer, the same trial counsel who represented Appellant Jenkins in the criminal case below in *Georgia v. Jenkins*, filed a petition for removal in the U.S. District Court for the Middle District of Georgia, Albany Division, effecting the removal of the State Court action to the Federal District Court, ousting the State Court of its jurisdiction to hear the District Attorney's petition for an injunction and to abate a public nuisance, and depriving the District Attorney of his power to enforce the civil remedy in the state court.

A copy of the petition for removal to the U.S. District Court for the Middle District of Georgia, Albany Division, appears herein at Appendix L, pages 11 to 29.

3. The District Attorney's Civil Proceedings on October 12, 1971, Against Another Theater's (Martin Theater) Exhibition of "Carnal Knowledge."

As stated above the first legal proceedings in Albany, Georgia against the exhibition of "Carnal Knowledge" did not begin with Jenkin's exhibition of "Carnal Knowledge" at the Broad Avenue Cinema on Jan. 13, 1972. Such began 3 months earlier when, on Oct. 8, 1971, the Martin Theatres of Georgia, Inc. commenced exhibiting "Carnal Knowledge" at the Martin Twin Theatres in Albany.

The District Attorney viewed the film at the Martin Twin Theatres on Friday, Oct. 8, 1971, and thereafter commenced both criminal and civil proceedings against the Martin Theatres of Georgia, Inc. and its employees. On Oct. 9, 1971, the film was seized under a search warrant and the Martin Twin Theatre manager T. J. Turlington and projectionist T. W. Gordon were charged with two counts each of violating the newly enacted State Obscenity Statute, which specifically prohibited the public display of sexual intercourse and/or lewd sexual acts. In addition, the District Attorney also commenced civil proceedings against the film in Dougherty County Superior Court. (See Albany Sunday Herald news article of Oct. 10, 1971 at Appendix M, page 3.)

When Martin Theatres Inc. of Georgia commenced showing "Carnal Knowledge" at the Martin Twin Theatres on Oct. 8, 1971, a civil action against the Martin Theater (similar to the aforementioned civil action against S.W.J. Inc. dba Broad Avenue Cinema), entitled *Robert W. Reynolds, District Attorney, v. Martin Theatres of Georgia, Inc.*, Civil Action File No. 7381, was already on file in the Superior Court for the County of Dougherty, having been filed on Sept. 8, 1971. In that civil action, District Attorney Reynolds alleged a public nuisance under recently adopted Georgia Code Section 26-2103 which provides as follows:

"The use of any premises in violation of any of the provisions of this chapter shall constitute a public nuisance."

and sought an injunction against the theater based upon the showing of several films at that theater. A copy of the summons and complaint in *Robert W. Reynolds District Attorney v. Martin Theatres of Georgia, Inc.*, Civil Action File No. 7381 is attached hereto at Appendix N, pages 3-6.

At the time of filing the abovementioned civil action on Sept. 8, 1971, the District Attorney had obtained a court order directing Martin Theatres, Inc. of Georgia to show cause on Oct. 13, 1971, why the theater should not be temporarily restrained from carrying on a public nuisance pending the trial of the case (see copy of the Court Order at Appendix N, page 6). When Martin Theatres, Inc. of Georgia commenced exhibiting "Carnal Knowledge" on Oct. 8, 1971, District Attorney Reynolds moved to amend the civil complaint in the State Court to include an allegation that "Carnal Knowledge" had been shown on Oct. 8 and Oct. 9, 1971. On Oct. 12, 1971, the trial court allowed and ordered the amendment re "Carnal Knowledge" to be filed (see copy of the Motion for Leave to Amend and Order at Appendix N, pages 7-8). On the same day, the attorney for Martin Theatres, Inc. of Georgia, filed a motion for summary judgment and set the same for a hearing on Nov. 30, 1971. (See copy of the Motion and Order at Appendix N, pages 9-19).

4. A "Recognition and Agreement" is Reached on Nov. 30, 1971 as to "Carnal Knowledge", Which the District Attorney Attributed to this Court's refusal on Nov. 9, 1971 to Hear the Atlanta, Georgia "I Am Curious (Yellow)" Case.

On Nov. 30, 1971, the District Attorney of Dougherty County and Martin Theatres, Inc. of Georgia, compromised the civil and criminal lawsuits and filed a "Recognition and

Agreement" in the above-entitled civil action No. 7381, (a copy of which appears herein at Appendix N, pages 11 to 14), whereby it was agreed that:

> "The film 'Carnal Knowledge' will not be shown in Dougherty County, Georgia, unless by a final binding, as to Dougherty County, judicial determination the film 'Carnal Knowledge' is found to be 'not obscene.' The determination mentioned shall be by the Georgia Court System."

The settlement between the District Attorney and Martin Theatres, Inc. regarding "Carnal Knowledge" was reported in a news article in the Albany Herald of Dec. 1, 1971, a copy of which appears herein at Appendix N, page 15. There it was reported that the settlement was based upon the U. S. Supreme Court's refusal, three weeks earlier, to review the Georgia Supreme Court's "I Am Curious (Yellow)" decision:

> "Reynolds said the agreement was reached on the basis of a recent Georgia Supreme Court ruling which held the film 'I Am Curious Yellow' to be obscene.
>
> "The United States Supreme Court declined to review the Georgia Court's decision, thereby upholding the action, he said. . . ."

See *Evans Theatre Corp. v. Slaton*, 227 Ga. 377, 180 S.E. 2d 712 (Mar. 4, 1971), cert. den. 404 US 950, 30 L.Ed.2d 267, 92 S.Ct. 281 (Nov. 9, 1971).

On the same date an order of dismissal was filed in the civil action, *Robert W. Reynolds, District Attorney v. Martin Theatres of Georgia Inc., Civ No. 7381* (a copy of the dismissal appears herein at Appendix N, page 16). In the criminal action entitled, *Georgia v. Gordon and Turlington*, No. 23877, (see page 18) an order of nol pros was entered. (A copy of the nol pros appears at Appendix N, page 17).

The petition in *Robert W. Reynolds, District Attorney v. S.W.J. Inc.*, No. 7296 was dismissed by District Attorney Reynolds at the same time that the "Recognition and Agreement" as to "Carnal Knowledge" and dismissal was filed in

Robert W. Reynolds v. Martin Theatres, Inc. of Georgia (Nov. 30, 1971). See Appendix L, page 3 and the news article appearing in the Albany Herald of Dec. 1, 1971, a copy of which appears herein at Appendix N, page 15.

5. On Jan. 13, 1972, Jenkins Decides to run the Risk as to "Carnal Knowledge".

Thereafter when, in January of 1972, Appellant Billy Jenkins commenced the exhibition of "Carnal Knowledge" at the Broad Avenue Cinema Theatre, in Albany, Georgia, Lynn Stout, an investigator in the Dougherty County Sheriff's office obtained a search warrant from the Dougherty County Superior Court and executed the same on Jan. 13, 1972. At that time he served a copy of the search warrant on Jenkins (J.A. 15-16) and took possession of the film under the search warrant. On Jan. 14, 1972, the film was shown to the Dougherty County Grand Jury (J.A. 18).

6. An Unfavorable Ruling on the Prior Adversary Hearing Issue Forces the Return of The Copy Seized on Jan. 13, 1972 Under the Ex Parte Search Warrant.

The record before this court fails to reflect that, based upon the evidence obtained through execution of the Jan. 13, 1972 search warrant, four Grand Jury indictments were obtained against the owners, a projectionist, and the ticket seller on an alleged violation of the Georgia Obscenity Law. Subsequent to such seizure, defense counsel made a motion to suppress the evidence in the Dougherty County Superior Court, alleging that the Jan. 13, 1972 seizure under the search warrant was unconstitutional in that a prior adversary hearing had not been held before issuance of the search warrant. Superior Court Judge Asa D. Kelley, Jr. ruled in favor of the theater and ordered that the copy of the film which had been seized on Jan. 13, 1972 was to be returned to the theater owner. (See Albany Herald News Report of Feb. 8, 1972, appearing at Appendix O, page 3.)

7. On Feb. 9, 1972, Jenkins Resumes the Showing of "Carnal Knowledge." Following Jenkin's Refusal to Present the Film at a Civil Prior Adversary Hearing, the Film is Seized Again Under A Search Warrant and Jenkins is Thereafter Arrested.

Thereafter, when the Broad Avenue Cinema announced that it was going to reschedule "Carnal Knowledge" for an engagement at the Broad Avenue Cinema, beginning on Wednesday, Feb. 9, 1972 (see Albany Herald News Article, dated Feb. 8, 1972, a copy of which appears herein at Appendix 0, page 3). District Attorney Robert Reynolds, on Monday, Feb. 7, 1972, filed a petition for an adversary hearing on behalf of Investigator Lynn Stout with Dougherty County Superior Court Judge Asa D. Kelley, Jr., and, later, with the City Court. At a hearing in the City Court on Wednesday, Feb. 9, 1972, Charles Hatcher, attorney for Billy Jenkins, did not produce the film and contested the power of the City Court to conduct the hearing. City Court Judge William T. Jones denied the motion on the grounds that if the Court had the power to sign search warrants then he also had the right to conduct the adversary hearing. Thereupon, City Judge William T. Jones signed an order authorizing the seizure of the film (see Albany news article of Feb. 9, 1972, a copy of which appears herein at Appendix 0, page 4.)[11]

[11] Appellant's brief is in error when it suggests on page 6, paragraph 2 that the film which was shown to the jury on Mar. 22, 1972 was the one which was seized on Jan. 13, 1972, and when it suggests at footnote 3 that "The seizure of the film and its continued detention throughout the proceedings below clearly violated both First and Fourth Amendments standards. Heller v. New York, 413 US 483 (1973); Roaden v. Kentucky, 413 US 496 (1973). However, Appellant did not object to the introduction of the film as evidence and, accordingly, the seizure is not before this Court on this appeal. . . ." The copy of "Carnal Knowledge" that was seized on Jan. 13th was returned to the theatre under Judge Kelley's erroneous ruling that the January 13, 1972 seizure was unconstitutional because of a failure to provide a prior adversary hearing (See page 21 supra). It should be noted that it was only when Jenkins thereafter insisted upon again showing the film that (1) a second search warrant was applied for, and executed on Feb. 9th and that (2) Jenkins was arrested on Feb. 10, 1974 for a violation of section 26-2105.

Thereafter, on the same day, Sheriff investigator executed the search warrant and seized a second copy of the film (see Albany Herald News Report of Feb. 10, 1972, a copy of which appears herein at Appendix 0, page 5). On the following day, Lynn Stout executed an affidavit and a warrant of arrest was issued charging Billy Jenkins with a violation of Georgia Code Section 26-2105 (J.A. 5, 6).

The film was shown to the March Term, 1972 Grand Jury which returned its indictment on Mar. 6, 1972. In the charging language of the Grand Jury indictment it was alleged in general terms that Jenkins was charged with the offense of "distributing obscene material" and more specifically that he did:

> "Knowingly exhibit a motion picture to the general public which motion picture contained conduct showing (a) an act of sexual intercourse, (b) a lewd exposure of the sexual organs, (c) a lewd appearance in a state of partial or complete nudity, (d) a lewd carress or indecent fondling of another person. . . ."

On Monday, Mar. 20, 1972, Superior Court Judge Asa D. Kelley Jr. overruled Jenkins demurrer to the Grand Jury indictment (J.A. 9) as to each and every ground without comment. (J.A. 13).

8. The First Criminal Trial of Jenkins to an 11 Men, 1 Woman Jury ends on Mar. 21, 1972 After 10 Hours of Deliberation With the Jurors split 11-1.

On the same day (Mar. 20, 1972) the first trial of Jenkins was conducted in the Dougherty County Superior Court with the selection of the jury being conducted from approximately 9:30 A.M. until shortly after Noon, at which time the jury of eleven men and one woman was chosen to try the cause (see News Report of Albany Herald of Mar. 20, 1972, a copy of which appears herein at Appendix 0, page 6). Evidence was presented and the cause was submitted to the jury. Thereafter, on Monday, Mar. 20th and Tuesday, Mar. 21st the jury considered the matter for approximately ten hours without rendering a verdict. On Mar. 21, 1972 at approxi-

mately 12:15 P.M. a mistrial was declared by Superior Court Judge Asa D. Kelley Jr., with the jury deadlocked 11-to-1 (see Albany Herald Examiner, of Mar. 21, 1972, a copy of which appears herein at appendix 0, page 7).

9. The Second Criminal Trial of Jenkins Commences the Next Day (Mar. 22, 1972) to an all Male Jury.

On the following day, Wednesday, Mar. 22, 1972, the case was retried in the Dougherty County Superior Court a second time to an all male jury (see newspaper report of Albany Herald of Mar. 22, 1972 a copy of which appears herein at Appendix 0, page 8).

STATE OF GEORGIA: CASE IN CHIEF

Lynn Stout testified for the State of Georgia and stated that he was an investigator with the Dougherty County Sheriff's Department; that he knew Billy Jenkins and had talked to him many times; that "He is running the theatre. I think his formal title would be manager"; that he had gone to the theatre on Jan. 13, 1972 (J.A. 15) and at that time "seized with a search warrant the movie entitled 'Carnal Knowledge' " which had been playing there on that date; that at that time Billy Jenkins was there and that he had shown the search warrant papers to him and that thereafter they had proceeded upstairs where the film was rewound and seized by him at which time he handed Billy Jenkins a copy of the search warrant papers (J.A. 16).

On cross-examination, Stout stated that at the time of service of the search warrant approximately 125 to 150 people were present in the theater; that he assumed that Billy Jenkins ran the theatre because "he is the man that gave all the orders to rewind the film and to have the people leave the theatre and etc.;" "he was in charge at the time that I made the seizure." Stout stated that he had seized "Carnal Knowledge" three or four times in Atlanta, Georgia, and that he had drawn the search warrant for the first seizure at the Martin Twin Theatre; that he had viewed it before and also on Feb. 14, 1972, when it was shown to the Grand Jury (J.A. 18).

Upon completion of investigator Stout's testimony, the District Attorney offered in evidence an affidavit signed by Billy Jenkins which stated that he was the president of that theatre. The District Attorney also offered into evidence the copy of the film "Carnal Knowledge" which investigator Stout testified to, as having been seized by him. The court retired for lunch.

The jury returned to the courtroom at 12:45 P.M. and proceeded to the Broad Avenue Cinema where they viewed the film "Carnal Knowledge" and thereafter returned to the courtroom at which time the District Attorney offered the film in evidence and the same was admitted without objection. At that point the State of Georgia rested.

BILLY JENKINS: THE DEFENSE

Ed Lightsey testified for the defense and stated that he worked at WALB Television; that on the previous evening he had gone to the Martin Twin Theatre in Dougherty County where he saw the film "Such Good Friends". An objection by the District Attorney to questions concerning what scenes in the film "Such Good Friends" he had viewed at that theatre was overruled on the grounds that it would be permitted for the purpose of demonstrating the community's attitude and standards. He thereafter testified to the following contents of the film "Such Good Friends."

He stated that he saw a man with his clothes off; that he heard curse words, such as, bastard, fuck, screw, shit, God damn, (R.T. 26); that one of the lines was "How do you beat the shit out of a man who has just screwed your wife" and that the answer was "you don't, you beat the shit out of his wife"; that there was a scene where a woman said, "Let's fuck our way to mental health"; that he saw the front of a nude woman with breasts and pubic hairs exposed (R. 27); that in one of the scenes a "man was attempting to have sexual intercourse with a woman and the man could not achieve an erection and they were both nude laying down"; (R.T. 28); that in one of the scenes while one of the men "was talking over the telephone, a woman, one of the es-

sential characters in the movie, performed an act of sodomy on him" and that after this was over, he said "Oh, God damn, I'm sorry I got it on your nose" (R.T. 28).

On cross-examination by District Attorney Reynolds, Mr. Lightsey stated that he had seen the picture "last night" and that he had told the defense that he had seen the film "shortly after the trial began this morning after the jury had been selected" (R.T.30). Asked concerning the sodomy scene, "It didn't show her mouth on his penis" he answered, "that's right" and that it just implied that she was having her mouth on him by facial expressions and that sort of thing (R.T. 31). Asked whether in the attempted intercourse, "It didn't show the penetration of the female organ by the male" (R.T. 32) and "that was just implied, wasn't it?" he answered, "Yes."

On re-direct examination by Defense Attorney Geer, Mr. Lightsey stated that he had seen "Carnal Knowledge". Asked "Did you see any penetration of the male sex organ in the female organ? he stated, "No I did not." Asked "Did you see any pubic hairs in 'Carnal Knowledge'?" he stated, "No, I don't think so" but that he had in "Such Good Friends". Mr. Geer then asked the question, "Mr. Reynolds asked you if the scenes that you have described were obscene. You said, 'Well, yes, I guess so'. Was the total movie obscene to you?" He answered, "No, it was very sad." (R.T. 32) Asked if "Such Good Friends" had "some message of social redeeming value", he answered, "Yes, sir." (R.T. 33)

B. C. Gable testified as a witness for the defense. He stated that he had seen "Carnal Knowledge" on Monday afternoon and had seen the film "Such Good Friends" on Friday night at the Martin Twin No. 1 Theatre in Dougherty County. (R.T. 36) Asked if he had seen a nude woman in that picture show, he stated, "I believe so. I have seen so many that I will have to remember back. I think so. I'm almost certain." He stated that he had seen her breasts and thought he had seen her pubic hairs. Asked to tell the jury about the scene of a man talking over a telephone with a woman doing something to him, he stated (R.T. 36), "Well, actualy all you could see was the - - I believe was the doctor and he had

trouble getting his corset off while she wasn't watching and then - - after then he kept talking over the phone and, of course, you can imagine, but it never showed anything from the waist down at that time. . . ." Asked the question, "What was insinuated", he answered, "I don't know the proper word to use for it" (R.T. 36). Asked the question, "What did the man say, if anything, at the conclusion of the scene when this was over with. . . ." He answered, "Well, Mr. Geer, it was actually anatomical to me. I was laughing pretty good,[12] but I don't remember the exact words. Like I said, I have seen two shows since then and I can't remember the exact words. . . ." (R.T. 37)

Barbara Folsom testified on behalf of the defendant and stated that she was 16 years old and was married (R.T. 38). She identified "Gem" as a magazine which she had purchased on Mar. 22, 1971, at 1600 East Broad at the Zippy Market (R.T. 39). She identified "Gala" as a magazine she bought at No. Jackson Street at the Economy Drugstore on Mar. 22, 1971 (R.T. 40). She identified "True Men" as a magazine she bought on Mar. 22, 1971 at the 2500 block of Radium Springs Road (R.T. 40). She identified "Girls of the World" as a magazine bought by her at 100 Martin Road on Mar. 22 1971 (R.T. 40-41). She identified the magazine "Climax" as one purchased by her on Mar. 22, 1971, at the 1300 block of East Broad (R.T. 41). She identified "Man's Book" as a magazine bought by her at 1400 Palmyra Road on Mar. 22, 1971.

On cross-examination by District Attorney Reynolds, Barbara Folsom stated that she worked at the concession stand at the Broad Avenue Cinema and had started working there in October 1971 and had been working there for six months (R.T. 43). Asked whether she watched any of the movies while she was not selling tickets, she answered, "Some times if a good movie comes around there, I will watch them." (R.T. 43)

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[12] It is worth noting that defense witness Gable just would not answer the leading questions asked by Defense Attorney Geer.

Joan Singletary was called as a witness for the defendant but was excused when the District Attorney stated that in the interest of time it would be agreed that she had purchased the box of magazines comprising composite exhibit No. 7 (R.T. 45).

Defendant Bill Jenkins was called and, as is permitted under Georgia law, made an unsworn statement. He stated that he had been in the theater management business for ten years; that he came to Atlanta, Ga., in Feb. 1966 as the City Manager of Martin Theatres in charge of their operation in Albany, Ga.; that in the 10 years' period he had "played all types of movies" and "seen many changes in the audience appeal as well as production changes to satisfy these changes in the audience's appeal." (R.T. 47) Concerning his knowledge[13] of the obsenity of "Carnal Knowledge" he stated:

> "As far as the motion picture Carnal Knowledge is concerned, I have no knowledge of this motion picture being obscene or breaking any state or local law because of its content. The picture was critically acclaimed as one of the ten best pictures of 1971 and Ann Margret has received an Academy Award nomination for her performance in this picture.
>
> "Carnal Knowledge played in 29 towns in the State of Georgia and is now going into 50 to 60 more theaters for spring and summer showing.
>
> "Included in these showings are Camilla, Georgia, which has the picture booked for March the 31st and Camilla is only 30 miles from Albany. A few of the 29 cities and towns where Carnal Knowledge has played without incident are Cordele, Valdosta, Douglas, Fitzgerald, Macon, Savannah, Milledgeville, Augusta, Dalton, Gainesville, Carlton, Rome, and is in Atlanta now showing for the second time.
>
> "So, Gentlemen of the Jury, as I have said earlier, I

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[13] On Jenkins' knowledge, see Statement of Case at B2 thru B9 on pages 16 to 24 supra and the stipulation of defense counsel, infra, at text to footnote 14.

have no knowledge of the motion picture, Carnal Knowledge, being obscene or violating any state or local laws.

"Also, I would like to bring out one more thing in reference to Carnal Knowledge. We are not suggesting this movie should be shown to the children. We put – there is an R rating on the picture and we have not and don't intend to admit anyone under the age of 18 in the theater; 18 year olds and older will be the only ones that can see the picture..."(R.T. 48,49) [13A]

The defense rested.

STATE OF GEORGIA REBUTTAL

Lynn Stout was recalled as a witness for the State of Georgia and stated that in July of 1971 at the District Attorney's request he had started to make an investigation of the movies being shown in Dougherty County; that he had a 35 mm Kodak camera with Kodak 2475 high speed film that would permit him to take photographs of a motion picture screen; that some time after July 1st, 1971, he started going to all of the theaters in Albany, Ga., including the Broad Avenue Cinema. (R.T. 50) He identified nine photos (State's Ex. 2-10) as being photographs taken by him of pictures shown at the Broad Avenue Cinema July 14 (Ravager); July 12 (Sweet Bird of Aquarius); July 4 (Midnight Plowboy); July 22 (Southern Comfort) and (Tobacco Roody). (R.T. 51, 52)

In rebuttal to the statement of Mr. Jenkins that nobody under 18 was allowed in the Broad Avenue Cinema, Stout

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[13A] Under an "R" rating a 17 year old would be admitted. See 1973 International Motion Picture Almanac, Quigley Publishing Co. Inc., at page 675, reading:

R RESTRICTED UNDER 17 REQUIRES ACCOMPANYING PARENT OR ADULT GUARDIAN.

This category includes motion pictures that in the opinion of the Code and Rating Administration, because of their theme, content or treatment, should not be presented to persons under 17 unless accompanied by a parent or adult guardian.

was asked if an arrest was made in July or August of 1971 at the Broad Avenue Cinema and Stout stated that there had been and that the ticket taker, ticket seller, and the manager and projectionist had been arrested and that the age of one of the projectionist was 16. (R.T. 52, 53)

Asked in rebuttal whether "Carnal Knowledge" had been seized from the Martin Theater in October, he stated, yes, and that he had drawn up the search warrant after viewing the film. Asked the question, "Do you know whether or not sometime after that the Martin Theater agreed not to show the film unless there was a judicial determination?" Mr. Geer interrupted [14] and the following discourse occurred:

> "Mr. Geer: I will stipulate that I recall the agreement Your Honor, and it was admitted, and I will stipulate to it.
>
> The Court: Let the record so indicate."

On cross-examination by Defense Attorney Geer, Stout was asked, "Do you know that the Martin Theaters had already shown every last one of them (the pictures identified as State Exhibits 2-10) before they were shown over at the Broad Avenue Cinema?" He answered, "I knew that Tobacco Roody was shown over there at the Martin Theater." (R.T. 55)

At the conclusion of Stout's testimony District Attorney Reynolds offered the photographs in evidence. Mr. Geer objected to their introduction except "to show the community standards as evidence on behalf of the State of Georgia." District Attorney Reynolds stated that they were being offered for a different purpose [15]:

> "The purpose is to impeach Billy Jenkins when he said that he has no knowledge of Carnal Knowledge being obscene. We introduce those in evidence to show that he had knowledge of the obscenity in those films and that he knew that the Martin Theaters for all

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[14] See Footnote 13.

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[15] See text, at Footnote 13, supra, and Statement of the Case at page 16 to 23 supra.

practical purposes had considered they shouldn't be shown. . . ." (R.T. 56) Thereafter, the Court ruled (R.T. 58)

"The Court: "Mr. Reynolds indicated that he is offering it for impeachment and it's for the Jury to decide on that question. . . ."

Both parties rested. (R.T. 58, 59)

On Mar. 23, 1972, the jury returned a general verdict of guilty (See Albany Herald news article of Mar. 24, 1972, a copy of which appears herein at Appendix 0, page 9.) (J.A. 38). Jenkins was fined $750.00 and sentenced to 12 months probation (J.A. 40-41).

Jenkins appealed the judgment to the Supreme Court of Georgia, arguing that Section 26-2105 was unconstitutional on its face and as applied to him; that he was denied due process of law; that it was error to refuse to give defendant's charge No. 1 which "defined community standards as being in the nation as a whole [16] and any less standard applied in the charge is harmful and prejudicial to defendant;" and that the film 'Carnal Knowledge' is not obscene in any case (Appellant's Enumeration of Errors in the Supreme Court of Georgia J.A. 46-51).

On June 21, 1973, this Court announced its decision in *Miller v. Calif.*, 413, US 15 (1973) and companion cases. On July 2, 1973, without hearing oral argument, the Supreme Court of Georgia affirmed the conviction of Billy Jenkins by a vote of four-to-three. *Jenkins v. State of Georgia*, 230 Ga. 726, 199 SE 2d 183.

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[16] Amicus submits that Appellant's claim of error in the trial court's refusing to instruct on "National Standards" was answered in Miller v. California 413 US 15, 37 L.Ed.2d, 419, 435, 93 S.Ct. 2607 (June 21, 1973). Jurisdictional Question 3 (JA4) was not perfected and is not properly before this court.

SUMMARY OF ARGUMENT

I

Georgia Code Section 26-2105 functions in two separate capacities. First, viewed independently as a statute which proscribes specific conduct, it describes an indictable offense under the criminal law. Secondly, construed in pari materia with the general obscenity statute, Georgia Code Section 26-2101, it prescribes a specific standard which, upon being ingrafted to that statute, supplies the ingredient which is necessary under this Court's present thinking, to assure the constitutionality of the Georgia State Obscenity Statute.

Due to the nature of the grand jury indictment, the Georgia Supreme Court was not confronted with the facial *validity* of Georgia Code Section 26-2105. Although Billy Jenkins was arrested on a charge of violating Section 26-2105, he was indicted and tried for "distributing obscene material" which is the indictable crime set forth in Georgia Code Section 26-2101(a). The grand jury merely pleaded the specific standards of Section 26-2105 so as to give the defendant "fair notice" as to the nature of the "distributing obscene material" charge.

It defeats logic to say that an act of sodomy or perversion is punishable as a felony, and at the same time hold that a 2-1/2 minute pictorial display of sodomy on an enlarged motion picture screen, albeit simulated, to a public audience, as a part of commercial entertainment, may not be reached by legal sanctions, both civil and criminal.

Analytically, there are two separate problems. The first concerns the civil side of the issue as it pertains to the right of government to enjoin the public exhibition of explicit sexual conduct, based upon judicially or legislatively determined public policy. The second concerns the criminal side of the same issue, that is, the right of government to impose criminal sanctions against those who engage in conduct which contravenes the public policy which forbids such public display.

This Court would be misguided were it to undertake an analysis of this criminal statute without at the outset examin-

ing, and bringing into focus the extent of the governmental power which exists under the civil remedy, where lewd conduct is involved. Such an examination is necessary so that collateral issues such as "fair notice", "mens rea" and "scienter" may not becloud the broad reach of the governmental policy against public lewdness.

Had the District Attorney of Dougherty County been able to try the basic issue regarding "Carnal Knowledge" on the *civil* side of the Georgia court, as was done in the "I Am Curious (Yellow)" case in Atlanta, Georgia, the focus would have been sharpened. No one would have misread the real issue, not even the three Justices who dissented in the Georgia Supreme Court below. The issue there would have been simply, "Is the artist such a favorite of the law that, in plying his craft, he may exhibit to a public audience on an enlarged motion picture screen for public entertainment, an acted-out version of simulated oral sodomy, engaged in by 'beautiful' Hollywood actors to the accompaniment of pleasant surroundings and inviting musical sounds – in the face of an overriding public policy to the contrary?" On that fundamental issue, Judge Burke of the New York Court of Appeals answered, "No." in *Trans-Lux Distributing Corporation v. Board of Regents.*

Where civil sanctions are being applied, "fair notice" is not an issue. A final and complete resolution of the civil lawsuit does not depend upon the litigations issue as to whether "sexual conduct" is "specifically defined" by applicable state law. Further, since the Court's injunction is prospective in nature, no ex post facto collateral issue is presented.

Those courts which have faced and considered the *civil* issue have disposed of the same quite simply. See Justice Tom Clark, concurring in *Kingsley International Pictures Corp. v. Board of Regents*, 360 US 684, Justice Burke speaking in *Trans-Lux Distributing Corp. v. Board of Regents*, 248 NYS 2d 857, the per curiam opinion of the Ohio Supreme Court in *State of Ohio ex rel Keating v. Vixen*, 27 Ohio St.2d 278 as adhered to on remand in *State of Ohio ex rel Keating v. Vixen*, 37 Ohio St.2d 215 and *Evans Theatre Corp. v. Slaton*, 227 Ga. 377.

The legislative history of Section 26-2105 indicates that it was derived from Section 10 of the CDL Model Obscenity Statute. The comments on that model legislation indicate that the intent was to codify the concurring opinion of Justice Tom Clark in *Kingsley International Pictures, Corp. v. Board of Regents*, 360 US 684, as explicated by Justice Burke in *Trans-Lux Distributing Corp. v. Board of Regents* 248 NYS 2d 857.

During the past 15 years, a blanket of confusion has engulfed the motion picture production area, due in no small part to the failure of this Court to express a judicial philosophy which takes into account the public mores which have governed this Nation since its founding. A casual reference to the moral laws of this Nation dealing with sexuality, as codified by the legislatures of the State and Federal Government, is proof that such public mores do presently exist and are well defined. The foundation for this confusion in the motion picture area was laid in this Court's treatment of the "Lady Chatterly's Lover" appeal reviewing the refusal of the New York Court of Appeals to license the film "Lady Chatterly's Lover" as violative of the New York Education Law. The 1959 Court reversed the New York Court's ruling in an opinion written by Justice Stewart, which is criticized by Terrence J. Murphy in his book "Censorship: Government and Obscenity" and by Professor Clor in his book "Obscenity and Public Morality" for the moral vacuum it created.

In his dissenting opinion in the New York Court of Appeals below, Justice Van Voorhis had suggested that the motion picture division failed to exercise their power to exclude "obscenity" which included "the portrayal on the public screen of sexual intimacies whether they be marital or extra-marital". In his concurring opinion, Justice Clark voiced a somewhat similar rationale: "I see no grounds for confusion, however, were a statute to ban 'pornographic' films, or those that 'portray acts of sexual immorality, perversion or lewdness'. " Five years later, Justice Clark's statement of the law was adopted by a majority of the New York Court of Appeals as the principle under which a license was denied to the Swedish film, "A Stranger Knocks."

The latter film's only claim to fame was predicated upon two scenes depicting explicit sexual intercourse. Justice Burke, speaking for the majority in *Trans-Lux Distributing Corp. v. Board of Regents*, 248 NYS 2d 857, expounded on that principle at great length: "It is my view that a filmed presentation of sexual intercourse, whether real or simulated, is just as subject to State prohibitions as similar conduct if engaged in on the street. . . I take it to be conceded that New York may constitutionally prohibit sexual intercourse in public. . . To all argument predicated on artistic merit as decisive of the constitutional question, it is sufficient answer to say that artists are not such favorites of the law that they may ply their craft in the teeth of a declared overriding public policy against pornographic display. Since no other profession is privileged to bend public morals, policy and law to its internal craft standards, then neither should producers of film . . . ." This Court did not come to grips with this very real issue when the *Trans-Lux* case came before it during the 1964 October Term. For failure of this Court to enunciate a judicial philosophy in conformity with traditional moral law, this Nation now finds its public mores in the year 1974 - - - 15 years after the "Lady Chatterly's Lover" decision and 9 years after the "A Stranger Knocks" ruling – in a state of collapse, and the motion picture industry dominated by pornographers and ruled by anarchy. Amicus submits that the "Lady Chatterly's Lover" rationale must be reexamined.

When this Court handed down its decisions on June 21, 1973, in *Paris Adult Theatre I v. Slaton, et al.* 413 US 49, it mixed apples (general obscenity statutes involving criminal sanctions in *Miller)* with oranges (general obscenity statutes involving prospective civil injunction in *Paris Adult Theatre I)* and came by a result which engendered confusion. Such inconsistencies however would be of minor significance were the subject of the inquiry herein the facial constitutionality of Georgia Code Section 26-2105, standing alone and independent of the "pari materia" statutory construction placed upon it by the Georgia Supreme Court. On its face, Section 26-2105 is a special statute whose application not only is limited to conduct but is further restricted to that type of conduct which is visual. Considering Section 26-2105 by

itself, and independent of the "pari materia" construction placed upon it by the Georgia Supreme Court, it seems abundantly clear that the broad rule laid down by this Court in *Miller v. California, supra* and *Paris Adult Theatre I v. Slaton, supra,* involving *obscene materials* cannot logically be applied so as to limit the applicability of that statute.

Amicus submits that for this Court to hold that Section 26-2105(b) may not in the light of constitutional standards be applied independently of the General Obscenity Statutes is without basis in legal or ordinary logic, and if acceded by this Court, would compound the existing confusion. The inconsistency of such a line of reasoning is exposed by the use of a hypothetical example centering on the sodomy crime and the film "Deep Throat."

The conduct which is made illegal by Georgia Code Section 26-2105 is described as conduct which would be public indecency under Section 26-2011. Section 26-2011 describes four specific acts which come within the proscription of the statute namely:

(a) An act of sexual intercourse;
(b) A lewd exposure of the sexual organs;
(c) A lewd appearance in a state of partial or complete nudity;
(d) A lewd caress or indecent fondling of the body of another person.

There can be little doubt that such language satisfies the "fair notice" requirement stated in *Rabe v. Washington,* 405 US 313. The very purpose of the 1968 amendment which introduced the specific language to Section 26-2011 was "to substitute explicit conduct which falls within its proscriptions for the rather vague 'tending to debauch the morals' formerly employed." Except for the act of sexual intercourse, the designated acts must be performed in a lewd manner. The term "lewd" has a well-defined meaning under the law. Further, any question as to whether, under state law, the proscription as to an "act of sexual intercourse" included simulated sexual activity was fully answered in *Slaton v. Paris Adult Theatre I,* 185 S.E.2d 768 at 770 (Nov. 5, 1971).

II

As previously observed under Point I, while Jenkins was arrested on Feb. 10, 1972, for violating Georgia Code Section 26-2105, he was indicted by the grand jury on an accusation of "distributing obscene material" – a violation of Section 26-2101(a) of the Georgia Code. Under the grand jury indictment as framed, the facial validity of Section 26-2105 cannot be made the foundation for this appeal.

As noted above, Appellant was charged with and tried for a violation of Georgia Code Section 26-2101(a). The jury instructions as to Georgia Code Section 26-2105, 26-2101(c), and 26-2011 were given for the purpose of informing the jurors on the specific standards of conduct set for the state community by the State Legislature.

Appellant's error is twofold. First, he refuses to read the plain language of the accusation and the trial judge's instructions as meaning what they say. Secondly, he refuses to acknowledge that the rationale of this Court's decision in *Miller v. California*, 413 US 15, has upheld the construction given the Georgia Statutes by the trial court and his manner of instructing the jury. The *Miller* decision has unearthed one very basic and obvious principle, and that is, that all morality legislation functions in two separate capacities. As criminal legislation, such statutes "proscribe" certain conduct as illegal. At the same time, such legislation in its written form (being the enshrinement of the voice of the people) "prescribes" – that is, lays down a guide which can and must be given to the jury in proper cases, to be used by them at litmus paper in arriving at their factual determinations on a general obscenity charge.

Nor can Jenkins claim that he was not aware that he was being charged with a violation of Section 26-2101(a). His entire defense was aimed at establishing proof of the type of "community standards" which would win him an acquittal. He made no attempt in either the sworn testimonial evidence of others or in his own unsworn statement to offer evidence which would constitute a defense to Section 26-2105(b) such as, that the film did not contain acts which could be held to be public indecency, or that he had no knowledge of the portrayal of such acts in the film itself.

Finally, the Judge's instructions to the jury were clear that he was being tried on a Georgia Code Section 26-2101 accusation. The Trial Judge's instructions on the substantive crime of distributing obscene materials are embodied in the seven paragraphs which appear at pages 30-31 of the Joint Appendix. Those instructions to the jury (as the "trier of facts") fully comport with the rule of law laid down by this Court in *Miller v. California, supra.* Under the trial judge's first two statements, the jury (1) was informed that the nature of the accusation was that of knowingly exhibiting obscene material, and (2) was given the definition of the term "obscene material". During the case in chief, the jurors had viewed the film "Carnal Knowledge" which contained several scenes depicting explicit sexual activity. In view of such trial facts indicating explicit sexual activity on film, it became the duty of the trial judge to instruct the jury on those specific standards of conduct set by the Legislature which bore a relationship to the explicit sexual activity on film. As a part of the law on those questions, the jury was entitled to be informed as to the legislative voice of the people, regarding the public exhibition of films showing: (a) an act of sexual intercourse, and (b) a lewd caress or indecent fondling of the body of another person, etc. . .as enshrined in Senate Bill 108 and Section 26-2105(b).

It is not error for the trial court to read statutes in its instructions if the statutes read are pertinent, are justified by the evidence, and where their meaning as applied to the facts in the case is not susceptible of more than one construction. The latter requirement was met by the precautionary instructions given by the trial judge to the effect that "The question present with regard to the obscenity of the movie herein is not whether the particular publication depicts sex or sexual activity, but the question is whether the movie can be said to be obscene within the narrow limits as the law has heretofore defined such limits as to take the movie outside of the protection of the person involved. . . ."

Appellants claim that the trial judge should have defined community standards as being in the Nation as a whole has already been rejected by this Court in *Miller v. California,* 413 US 13, where Justice Burger, writing for

the majority of the Court, cited with approval the very language used by the trial court. Further, the Georgia Supreme Court has since indicated in *Slaton v. Paris Adult Theatre I*, 201 S.E.2d 456 (Oct. 30, 1973), that the standard for *appellate review* under Georgia law is a state standard, which places Georgia law squarely within the protection of the *Miller* decision. There is no substance in appellant's claim that the trial court in Dougherty County, Georgia must, in the first instance, instruct the jury in terms of a state standard. There is no reason to suspect that the standards of Dougherty County are any different than those in any other county in the State of Georgia or the Nation as a whole. In fact, at least one New Jersey Appellate Court has held that it was to be presumed that the community standards were the same.

Appellant in failing to present the question on community standards in the state court proceedings below, has failed to raise a substantial federal question for this Court's jurisdiction to lie.

The Georgia Supreme Court's interpretation given to Section 26-2105, namely, that it was to be construed in "pari materia" with the General Obscenity Statute, fulfills the requirement of this Court as stated in *Miller v. California, supra.* Except for the recent *Miller* refinement, the constitutionality of the Georgia Statute has already been established in *Gable v. Jenkins*, 397 US 592 (Apr. 20, 1970).

III

While *Miller v. California*, decided by this Court on June 21, 1973, has removed all of the hurdles which had been constructed against law enforcement prior to that date, the expected positive gains from those decisions have not been achieved. What is needed now is some strong direction from this Court to bring the Nation's courtrooms back on course. Amicus submits that the Court to steer, which this emergent condition requires, is in the direction of full reliance upon the rule of law expressed by Justice Harlan in his consenting opinion in *Roth-Alberts*, 354 US at 497 (June 24, 1957).

One of the principle questions before this Court, is the matter of how this Court will conduct itself in the future in reviewing the final results achieved by a state judicial system which has placed the new *Miller* requirements for specificity into operation. The alternatives are: (1) a resumption of the role of, what Amicus suggests is, dictatorial censorship at the hands of the judiciary, or (2) a commitment to the common sense view espoused by Justice Harlan, accompanied by a return to the state judiciary of the basic power to supervise public morality. The stage was set for this transfer of power when this Court stated in *Miller v. California*, 413 US 15: "If a state law that regulates obscene material is thus limited, as written or construed, the First Amendment values applicable to the States through the Fourteenth Amendment are adequately protected by the ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary...." The authorities cited for that proposition were Justice Harlan's concurring and dissenting opinions in previous state obscenity cases during the past 15 years.

Kois v. Wisconsin, 408 US 232 held that the dominant theme of the poem considering its placement amid a selection of peoms in the interior of a newspaper did not appeal to prurient interest. No such defense can be made of the subject matter and the facts on record herein.

This Court cannot shut its eyes to reality and to the fact that the real party in interest in this appeal is not Billy Jenkins, but AVCO Embassy Pictures Corp., the producer, Joseph E. Levine, the executive producer, Michael Nichols, the director, and the Motion Picture Association of America, Inc. The issuance of an "R" rating and its incorporation into the film print was intended by those producers and their agents to be a representation that, applying contemporary community standards, "Carnal Knowledge" was and is suitable film fare for (1) persons 17 years of age and over and (2) persons under 17 years of age when accompanied by parents or adult guardians. By its verdict in this case, the jury in Albany, Georgia, thought otherwise. So did a majority of the Georgia Supreme Court. To upset those judgments would lend encouragement to a disturbing develop-

ment which has been taking place in the area of motion picture films.

The commercial enterprise, which the motion picture industry represents, is engaged in a life and death struggle for the entertainment dollar. The movie moguls, whose primary concern is the corporate dollar, now find it necessary to concentrate their efforts on the type of entertainment which is not yet available to the general audience on the television screen – the theme with a sensationalized sex appeal. Although the promotion vehicle herein is slightly different from that employed by the typical porno producer, nevertheless the effect is the same. Although the admission price to "Carnal Knowledge" and similar films can be expected to return less than that of the typical porno theater, the potential audience of 17 year olds and over more than compensates for the difference in admission price and makes such production a business imperative – so long as the industry can get away with it in the courtroom. Both operations amount to one and the same thing – a capitalization on the appeal to prurient interest for the sake of commercial profit.

The technical excellence and potential audience for "Carnal Knowledge" sets it into a classification which is more destructive to society than "Deep Throat". Under Justice Harlan's appellate review, technical excellence is not an exculpating factor. See Justice Harlan's dissent in *A Book Named Memoirs v. Attorney General of the Common of Mass.*, 383 US at 459.

Studs Terkel in the Chicago Daily News on July 24-25, 1971, reviews the film as follows: "Carnal Knowledge is a masterpiece in slick packaging. That there is nothing inside, nothing other than the illusion of something is as small consequence to the box office. . . The tragedy lies not in this film, but in its being taken seriously as a profound comment on men and women. . . ."

The question before this Court on appellate review is whether or not "Carnal Knowledge" taken as a whole can be said to treat sex in a fundamentally offensive manner. See *Jacobellis v. Ohio*, 378 US 184 (Harlan dissenting). Harlan states his test as follows: "As to the states, I would make the

federal test one of rationality. I would not prohibit them from banning any material which, taken as a whole, has been reasonably found in state judicial proceedings to treat with sex in a fundmentally offensive manner, under rationally established criteria for judging such materials. . ." The answer to whether the producers and directors were capitalizing on an appeal to the prurient interest and whether the subject matter treated sex in a fundamentally offensive manner can only be determined by the individual members of this Court undertaking an analysis of "Carnal Knowledge". Amicus has attached hereto as Appendices A and B, a "Continuity" and a "Time-Motion Study" of the film "Carnal Knowledge". The "Continuity" appearing herein at Appendix A contains an accurate reproduction of the sound portions of the film identifying the actors, their roles, and what they say as the film progresses. In addition, selected visual screened depictions are captured by still camera. These small photographs are reproduced at the exact point in the dialogue where such images appear, creating a miniature screen effect. The story line is broken down into its integral scenes and timed from beginning to end to identify those segments in point of importance or exaggeration for the benefit of the justices considering this appeal. The "Time-Motion Study" appearing herein at Appendix B is a chronological series of photographs of the motion picture film, timed in their relative order of appearance which, by "stopping" the movement appearing on the motion picture screen and recording the same, permits the type of conduct being portrayed thereon to be analyzed in a fair and accurate manner. Also, attached to this Brief is a casette tape containing the sound track for "Carnal Knowledge" with 756 superimposed signals indicating at what point in the sound track the particular photograph used in the Continuity was taken. The "Continuity" and accompanying tape permit the film to be analyzed thru examination and re-examination.

In view of the large audience of 17 year olds and older to whom "Carnal Knowledge" was aimed, Amicus would ask the individual members of this Court whether the simulated oral sodomy and lewd fondling scenes, etc., do not consti-

tute an indictment against the film and the damage it has done and will do to the system of values and language of sex in our society. In a collection of writings in "A Case Against Pornography" Ian Robinson makes the following statement against pornography: "It is the central questions of value that defenders of pornography, and liberalizing sex-talk in general, tend to ignore – which is itself, we shall argue, a tendency to deprave and corrupt. . . If pornography is a threat it is. . .because pornography works on, affects and changes the common language of sex, and because it tends to deprave and corrupt that language. . . ." "Pornography doesn't cause depravity and corruption, it is depravity and corruption. . . ." "Because we have to do here with a language of sex, and with corruption as part of understanding, our readers are corrupted to the degree of their reading, and non-readers are corrupted to the degree of the impact of pornography on the common language. This last is why the matter affects everybody: The language of sex is everyone's concern, celibates and all, because we all have to make sense of sex within it. . . ." The author then makes the following statement which has particular application here: "A work whose sexual content is left deliberately uncontrolled by the artist is pornographic. Nude love-making on stage or screen is always necessarily pornographic because the expression - the understanding of the audience - cannot be controlled as part of the work. Nude love-making immediately breaks the art of the play and instead thrusts real voyeurism upon the audience. . . . We are used to modesty and privacy, and in our language of sex the response to nude love-making is not to the play but to the real (or not) action . . . ."

In the above framework of values, if the State of Georgia in crystal-clear legislative language, and crystal-clear judicial language, holds that a motion picture exhibitor may not exhibit "an act of sexual intercourse" and "a lewd fondling of the body of another person. . . ." then by sovereign fiat, those scenes become hard-core pornography. Amicus submits that it is not a proper exercise of this Court's federal appellate jurisdiction to tell the Georgia State Government that

it may not so act in relation to the scenes depicting explicit sexual conduct in "Carnal Knowledge".

The values which are at stake here are "public values" not those which Justice Marshall addressed himself in *Stanley v. Georgia*, 394 US 557.

Correlary to the question regarding the "Obscenity vel non" of "Carnal Knowledge" is the further question which should be asked regarding Jenkins' "conduct" as operator of the Broad Avenue Cinema. The evidence shows that Jenkins' conduct was such that it can be said the State acted reasonably in finding Jenkins guilty of operating a business which treated sex in a fundamentally offensive manner. The jury had before it photographs of other types of conduct exhibited regularly by Jenkins upon the motion picture screen. Further, Jenkins knew that "Carnal Knowledge" had been challenged successfully in the courtroom, and that an introduction of the film at the Broad Avenue Cinema was certain to bring law enforcement activity and publicity.

ARGUMENT
I

GEORGIA CODE ANNOTATED SECTION 26-2105 IS CONSTITUTIONAL ON ITS FACE

INTRODUCTION

Georgia Code Ann. Section 26-2105 functions in two separate capacities. First, viewed independently as a statute which proscribes specific conduct, it describes an indictable offense under the criminal law. See *Trans Lux Distributing Corp. v. Board of Regents* 248 N.Y.S. 2d 857 (Mar. 26, 1964), reversed on other grounds in *Trans Lux Distributing Corp. v. Board of Regents* 380 U.S. 259 13 L.Ed. 2d 959, 85 S Ct. 952 (Mar. 15, 1965). Secondly, construed in pari materia with the general obscenity statute, Georgia Code Ann. Section 26-2101, it prescribes a specific standard which, upon being ingrafted to that statute, supplies the ingredient which is necessary, under this Court's present thinking, to assure the constitutionality of that portion of the Georgia test for obscene materials reading: "applying community standards, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion. . ." *Miller v. Calif.* 413 U.S. 15, 37 L.Ed. 2d 419, 93 S. Ct 2607, *Paris Adult Theatre I v. Slaton* 413 U.S. 49, 37 L.Ed. 2d 446, 93 S. Ct 2628 (June 21, 1973).

Due to the nature of the grand jury indictment, the Georgia Supreme Court was not directly confronted with the facial validity of Georgia Code Ann. Section 26-2105, an issue which is inherent when the first function of the statute, mentioned above, is under consideration. The Georgia Supreme Court did not have before it, nor did it consider an indictment charging a violation of Georgia Code Ann. Sec. 26-2105. Although Billy Jenkins was *arrested* on a charge of violating Georgia Code Section 26-2105 (JA6), the March Term Grand Jury *did not indict* him on that charge. Instead, Jenkins was indicted and tried for "Distributing Obscene Material" (JA 7,8). The language of the indictment describes criminal conduct which is the indictable crime set forth in Georgia Code Ann. Section 26-2101(a). In framing the grand jury indict-

ment, the author merely pleaded the specific standards of Section 26-2105 so as to give the defendant fair notice as to the full nature of the charge - the second function of Section 26-2105, noted above.

A. The Problem of Applying Civil and Criminal Sanctions to Lewd Conduct in Motion Picture Films.

The communication media is plagued at the present time with an avalanche of lewd displays and language which, if engaged in off-stage or off-screen and in public, would be subject to criminal penalties as improper public conduct. It beggars logic to say that an act of sodomy or perversion is punishable as a felony, [16A] and at the same time hold that a 2 1/2 minute pictorial display of sodomy on an enlarged motion picture screen, albeit simulated, to a public audience, as a part of commercial entertainment, (See Appen. A at pages A78 -A84 and Appen. B at pages B24-B27) may not be reached by legal sanctions, both civil and criminal. Further, it is equally as illogical to say, on the one hand, that such conduct may be reached by civil sanctions, see *Evans Theatre Corporation v. Slaton*, 227 Ga 377, 180 SE 2 712, cert denied in *Evans Theatre Corp. v. Slaton*, 404 US 950, 30 L.Ed. 2, 267, 92 S.Ct. 281, (Nov. 9, 1971), yet may not be reached by criminal

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[16A] See Stone v. Wainwright U.S. , 50 L.Ed. 2d 179, S.Ct. (Nov. 5, 1973) discussed at Footnote 24, infra.

Which is more devastating to society. . . a 2-1/2 minute scene of simulated oral sodomy projected on a public screen of a neighborhood theater to a packed audience of 17 year olds and older, or several acts of explicit oral sodomy (e. g. Deep Throat) projected on a public screen in a porno theater, located on run-down Main Street or in a local neighborhood? Does any member of this Court have the right to draw such a distinction? See Judge Learned Hand's views at footnote 36, and the views of the Georgia Supreme Court in Evans Theater Corp. v. Slaton, supra, quoted at page 13, supra. Further, does the state of the public morals of this nation in 1974 support the thesis of Justices Brennen, Stewart, Marshall, and Douglas which underlies their dissenting opinions in Miller v. California, et al, supra, that we, as a nation, can withstand the assault such a distinction would encourage. See footnote 24 infra.

sanctions. . . or, that it may be reached by criminal sanctions, but only when examined, not as to conduct but, in accordance with the test for "obscene material" established by this Court in *Miller v. California, supra.*

It would appear that, unless there is *now* a different explanation in our jurisprudence, that is exactly what Justice Douglas was willing to admit to, in his 1957 dissent, in reviewing two criminal cases in Roth-Alberts, 354 US 476, at 512, 1 L.Ed. 2 1498, 77 S.Ct 1304 (June 24, 1957:

> "I assume there is nothing in the Constitution which forbids Congress from using its power over the mails to proscribe *conduct* on the ground of good morals. No one would suggest that the First Amendment permits nudity in public places, adultery, and other phases of sexual misconduct. . . ." (Our emphasis.)

Analytically, there are two separate problems presented here, each of which deserves a separate analysis. The first is the question raised on the civil side of the issue, as it pertains to the right of government to enjoin the public exhibition of explicit sexual conduct based upon a stated public policy, either judicially determined or legislatively determined. The second is the question raised on the criminal side of the same issue, as it pertains to the right of government to impose criminal sanctions upon those persons who, for whatever reason, elect to engage in conduct which contravenes the public policy which forbids such public displays.

Even though the statute under attack herein is a criminal statute imposing criminal sanctions, and the case under review is an appeal from a criminal conviction arising out of the application of that criminal statute to specific subject matter, still, the attention of this Court would be misguided were it to undertake an analysis of the criminal statute or its application in a given circumstance, without, at the outset examining, and bringing into focus the extent of the governmental power which exists under the *civil* remedy where lewd conduct is involved. That is essential, in order that side considerations which appear upon an analysis of the criminal sanctions, such as "fair notice", "mens rea", and "scienter" considerations,

etc., may not cloud and obfuscate the broad reach of the governmental policy against public lewdness.

B. A State's Power to Apply Civil Sanctions to Lewd Conduct on Films Has No Limitations such as Those Stated in Miller v. Calif., as to Obscene Materials.

The caveat which Amicus seeks to articulate can best be brought into focus by an illustration which takes into account the subject matter "Carnal Knowledge" and the surrounding historical facts when, in Jan. and Feb. of 1972, the case was prosecuted in Albany, Georgia. Suppose, for example, that the Dougherty County District Attorney had not been frustrated by the shrewd defense tactics of Billy Jenkins' lawyer, who removed the Dougherty County Superior Court civil action *Robert Reynolds, District Attorney v. S.W.J., Inc.*, C.A. No. 7296, to the Federal District Court. (See Statement of Facts, at Point B2 on pages 16-17), and had been able to try the basic issue as to "Carnal Knowledge" on the *civil* injunction side of the Georgia Courts, as was done in the "I Am Curious (Yellow)" case in Atlanta, Georgia? Amicus submits that, in that case, the focus would have been sharpened so that no one could have misread the real issue, not even the three justices who dissented in Jenkins v. Georgia, supra, in the Georgia Supreme Court below.[17] The issue there, very

[17] It was for this very reason that the Atlanta, Georgia, law enforcement effort in 1971 was pointed in the direction of the civil remedy and the forfeiture penalty, rather than at the criminal sanctions. (See page 11, supra) Compare the opinion of the Georgia Supreme Court in the "I Am Curious (Yellow)" case, Evans Theater Corp. v. Slaton, 227 Ga. 377, 180 S.E.2d 712, Mar. 4, 1971. In the criminal area, one is inclined to confuse the issues by reasoning along "dominant theme" lines, which assumes, erroneously, that the proscribed sexual conduct, which is specifically defined is acceptable so long as it is an "integrated" part of the theme. Amicus submits that the correct rule of law was stated in Trans-Lux Distributing Corp. v. Board of Regents, 248 NYS 2d 857 (Mar. 26, 1964):

> "If simulated sexual intercourse outrages public decency, it does so as such and not only when the sole or dominant subject of any given exhibition." Only when this misapprehension is corrected by a directive from this Court, will it be possible for law enforcement to assure that films like "Deep Throat" will have a very short run.

simply, would have been "Is the artist such a favorite of the law that, in plying his craft, he may exhibit to a public audience on an enlarged motion picture screen for public entertainment, an acted-out version of simulated oral sodomy, engaged in by "beautiful" Hollywood actors to the accompaniment of pleasant surroundings and inviting musical sounds? – in the face of an overriding public policy to the contrary, clearly articulated [18] by all three elements of government (See "Statutory Background" at Points A, 2, 3, and 4, supra at pages 10-15).

Certainly the problem is more easily understood where the only issue is "May the State enjoin such live conduct?" or, may the state enjoin such filmed portrayals of explicit "sexual conduct?" or, "May the State declare a forfeiture of the property interest in the product which embodies the lewd portrayals" or, "May the state declare a forfeiture of the profits from the commercial public exhibitions of such subject matter?" It seems to Amicus that, on this fundamental issue, Associate Judge Burke of the New York Court of Appeals was

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[18] In the light of subsequent events (i.e., the chaotic retreat of Justice Brennan in Paris Adult Theatre I v. Slaton, 413 US 49, 37 L.Ed.2d 446, at 467-491, 93 S Ct 2628 (June 21, 1973) was not Justice Brennan (in voting to override the "articulated" public policy of the States of Florida and Massachusetts) one of the principal actors in a "reverse" censorship movement in Grove Press, Inc. v Gerstein, 378 US 577, 12 L.Ed2d 1035, 84 S Ct 1909 (June 22, 1964) and Memoirs of a Woman of Pleasure v. Attorney General of Massachusetts, 383 US 413, 415, 16 L.Ed.2d 1, 3, 86 S Ct 975 (Mar. 21, 1966)? Compare Justice White's position in his dissent in Grove Press, Inc., v. Gerstein, supra, and in Memoirs, supra, at 461:

> "Nor does it mean that if books, like Fanny Hill are unprotected, their non prurient appeal is necessarily lost to the world. Literary style, history, teachings about sex, character description (even of a prostitute) or moral lessons need not come wrapped in such packages. The fact that they do impeaches their claims to immunity from legislative censure. . . ."
>
> "Finally, it should be remembered that if the publication and sale of Fanny Hill and like books are proscribed, it is not the the Constitution that imposes the ban. Censure stems from a legislative act, and legislatures are constitutionally free to embrace such books whenever they wish to do so. But if a State insists on treating Fanny Hill as obscene and forbidding its sale, the First Amendment does not prevent it from doing so. . . ."
>
> "I would affirm the judgment below." (Our emphasis.)

plainly correct when he stated in his majority opinion in *Trans Lux Distributing Corp. v. Board of Regents*, supra, at 863:

> "To all argument predicated on artistic merit as decisive of the constitutional question, it is sufficient answer to say that artists are not such favorites of the law that they may ply their craft in the teeth of a declared overriding public policy against pornographic displays. Since no other profession is priviledged to bend morals, policy and law to its internal craft standards, then neither should producers of films."

Where civil sanctions are being "fair notice" is not an issue. A final and complete resolution of the civil lawsuit does not depend upon the litigatious issue as to whether "sexual conduct" is "specifically defined" by applicable state law, *Miller v. California*, 413 US 15, 37 L.Ed.2 419, 431, 93 S.Ct. 2607. Since the Court's injunction is prospective in nature, no "expost facto" side issue is presented. See *State of Ohio ex rel Keating v. A Motion Picture Film Entitled Vixen*, 272 N.E.2d 137, 141, 27 Ohio St.2d 278 (July 21, 1971) as adhered to on remand in *State ex rel Keating v. Vixen*, 37 Ohio St.2d 215, 301 N.E.2d 880, (Sept. 26, 1973):

> "Since the real issue before this Court is whether the injunction should be dissolved, or combined in force and effect, RC §§ 2905.34 and 2905.35 are applicable at this time notwithstanding their enactment postdates the injunction granted below. . .
>
> It follows that we have authority to render such judgment as the Ohio Court would now be required to render, if the cause were remanded. Such authority is specifically given in Section 2(B) (1) (f), Art. IV Ohio Constitution."

In Amicus' view the authorities which have considered the civil issue, as thus isolated, have made a resolution of that single issue quite simple. Those authorities start with Justice Tom Clark concurring in *Kingsley International Pictures Corp. v. Regents*, 360 US 684, 702, 3 L.Ed2, 1512, 1524, 79 S.Ct. 1362 (June 29, 1959):

> "It may be, as Chief Judge Conway said, "that our public morality, possibly more than ever before, needs every protection government can give." 4 N.Y.S.2d at 363, 151 N.E.2d 204, 205, 175 N.Y.S.2d at 50. And, as my Brother Harlan points out, "each time such a statute is struck down, the State is left in more confusion." This is true where broad grounds are employed leaving no indication as to what may be necessary to meet the requirement of due process. *I see no grounds for confusion, however, were a statute to ban "pornographic" films, or those that "portray acts of sexual immorality, perversion, or lewdness."* (Our emphasis)

See also Justice Burke speaking in *Trans Lux Distributing Corp. V. Board of Regents*, 248 N.Y.S.2d 857, 858-864 (Mar. 15, 1965):

> "If simulated sexual intercourse outrages public decency, it does so as such and not only when the sole or dominant subject of any given exhibition. The licensing statute contemplates the deletion of such material. It may either be omitted entirely or the producer may redo the scene another way. *If it is objected that the enterprise is artistically not worth doing without the scene as it stands, this is the problem not of the law, but of the producer who has made a pornographic scene so central to his work. . .* " (Our emphasis)

The Per Curian opinion of the Ohio Supreme Court voiced the same sentiment in *State of Ohio ex rel Keating v. "Vixen"*, 27 Ohio St.2d 278, 272 N.E.2 137 at 140 (July 21, 1971) as adhered to on remand in *State of Ohio ex rel Keating v. "Vixen"*, 37 Ohio St.2d 215, 301 N.E.2d 888, (Sept. 26, 1973):

> *"Assume, hypothetically, that the main character in "The Sound of Music" performs, during one scene, an act of sexual lewdness, could we permit that part of the film to go unregulated* merely because the producer had an "eye on the recent Supreme Court ruling?" The question supplies its own answer. . ."

"Neither the First Amendment of the United States Constitution nor the Ohio Constitution will be construed as inhibiting the General Assembly from proscribing the commercial exploitation of a purported act of sexual intercourse. . . "(Our emphasis)

That is exactly the conclusion reached by the Georgia Supreme Court on the civil aspect of this philosophical controversy. See *Evans Theatre Corp. v. Slaton*, 227 Ga 377, 180 S.E.2d 712, where the Georgia Supreme Court held at page 715:

"The Criminal Code of Georgia makes penal a lewd performance in public, including an act of sexual intercourse and a lewd appearance in a state of nudity. Code Ann. § 26-2011 (Ga.L.1968, pp. 1249, 1301). Such acts are prohibited, not because of the injury inflicted on other individuals, as in the case of murder or robbery, but because the acts are offensive to the majority of the people. If any semblance of civilization is retained in our country, the States must have standards of conduct permissible in public. *There is little difference in the effect on the public between lewd conduct in public areas and lewd conduct explicitly performed on a motion picture screen for the viewing of the public.* (Our emphasis)

C. The Intent of the State Legislature in Enacting Georgia Code Section 26-2105 was to Codify the Rationale Expressed by Justice Tom Clark in his Concurring Opinion in Kingsley International Pictures, Corp. v. Regents, 360 US 684, 13 L.Ed.2, 1512, 1524, 79 S.Ct. 1362 (June 29, 1959) and to Apply Criminal Sanctions thereto.

Senate Bill 108, as originally filed, contained the major provisions of the CDL Model Obscenity Statute (see Statutory Background supra at pages 13 to 15). CDL Model Obscenity Statute sections 1 through 12, were offered as proposed Georgia Code Annotated Sections 26-2101 through 26-2112. CDL Model Obscenity Statute sections 17, 18, 19, 20 and 22 were offered as proposed Georgia Code Sections 26-1113

through 26-2117. CDL Obscenity Statute, sections 13, 14, 15, 16 and 21 were the only provisions omitted from Senate Bill 108 as originally filed. See copy of Senate Bill 108 as originally filed at Appendix H, pp. 3-13 and compare the same with the CDL Model Obscenity Statute at Appendix F pages 3-8. On March 4, 1971, a substitute bill to Senate Bill 108 was offered which deleted most of the sections of the CDL Model Obscenity Statute, but retained 1(a) public nuisance 10 (lewd conduct on the screen) and 18(a) (contraband) as proposed Georgia Code Sections 26-2103, 26-2104, and 26-2105 see Appendix I. On March 5, 1971, the substitute bill passed the Senate 29 to 0 and on Mar. 9, 1971, that bill passed the House by a vote of 104 to 4. On April 1, 1971, substitute Senate Bill 108 was signed by the Governor and became law on that date. See Appendix I at page 3 to 9.

Since Georgia Code Section 26-2105 was derived from Section 10 of the CDL Model Obscenity Statute, the intent of the Legislature becomes clear beyond doubt. See comments to Section 10 of the CDL Model Obscenity Statute, at Appendix G, page G-12, reading:

> "Sections 10 and 11 codify the rationale applied by the majority of the New York Court of Appeals in *Trans Lux Distributing Corp. v. Board of Regents*, 248 N.Y.S. 2d 857 (Mar. 26, 1964), reversed on other grounds in *Trans Lux Distributing Corp. v. Board of Regents* 380 US 259 (Mar. 15, 1965). See also Justice Clark concurring in *Kingsley International Pictures Corp. v. Regent* 360 US 684 at 702."

D. The Concurring Opinion of Justice Tom Clark in Trans-Lux Distributing Corp. v. Board of Regents contains a Correct Statement of Constitutional Law.

During the past 15 years, a blanket of confusion has engulfed the motion picture production area and all but destroyed that industry's understanding of the public responsibility which it bears under this Nation's obscenity laws.

Such confusion is [19] due in no small part to the failure of this Court until recently to enunciate a judicial philosphy which takes account of the public mores which have governed this Nation since its founding.[20] A casual reference to and brief reflection on the moral laws of this Nation dealing

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[19] The Court in People v. Kirkpatrick, 316NYS2d 37 (Oct. 28, 1970) had the following to say at page 42 on this general confusion as it related to the criminal law:

> "There is perhaps no area of criminal law in such utter state of confusion and frustration as that visited upon the publication and dissemination of obscene material 'Confusion now hath made masterpiece' (Macbeth, Act II).
>
> "The confusion, in great measure, must be attributable to the incredible divergence of views of the men on the United States Supreme Court, to whom all look for guidance. . . ."

While this Court's decision on June 21, 1973, in Miller v. Calif., supra, and the companion cases to Miller, supra, have done much to correct the confusion, they have had no effect on the porno theater other than to cause those operations to be stepped up. In recognition of the thin 5 - 4 majority in this Court and the disastrous effect such rulings would have on the industry's survival, if fully implemented, the industry leadership has girded itself for battle with the intentions of grinding Miller v. Calif. into the dust. The Los Angeles Herald-Examiner of Feb. 10, 1974, reported the following from the San Diego Convention of the Adult Film Association of America:

> " 'There has been more explicit sex in theaters after the Supreme Court decision than there was before,' said David F. Friedman, president of the Adult Film Association. 'The Supreme Court decision merely drew more attention to adult films. The news media has also played a role,' he said. ' "Deep Throat" would have been just another explicit sex film which would have lived and died in a short time, except that the media picked it up and coined a new word (pornochic) which made it seem acceptable . . . .' "

The industry will certainly walk over this Court if the Court fails to give recognition to, and support the rationale of Justice Tom Clark in Kingsley International Pictures Corp. v. Regents, supra, when law enforcement elects to proceed against conduct alone under a specific statute similar to Georgia Code Section 26-2105.

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[20] This Court recently said in Paris Adult Theatre I v. Slaton, 413 US 49, 37 L.Ed.2d 446, 93 S Ct 2628, June 21, 1973:

> "The States, of course, may follow such a 'laissez faire' policy and drop all controls on commercialized obscenity, if that is what they prefer, just as they can ignore consumer protection in the place, but nothing in the Constitution compels the States to do so with regard to matters falling within state jurisdiction. . . ."

(footnote continued on next page)

with sexuality, as codified by the state legislatures (see Appendix P at pages 2-16, is cogent proof that such public mores do presently exist and are well defined. See also, *City of Youngstown, Ohio v. DeLoreto*, 251 N.E.2d 291, 48 Ohio Op. 2d 393 at 400 (Sept. 10, 1969); *State of Ohio ex rel Ewing v. Without A Stitch*, 57 Ohio Op. 2d 184 at 187 (July 9, 1971), affirmed in and *State of Ohio ex rel Keating v. Vixen*, 272 N.E.2d 137 at 140, 27 Ohio St. 2d 278 (July 21, 1971) as adhered to on remand in *State of Ohio ex rel Keating v. "Vixen"*, 37 Ohio St.2d 215, 301 N.E.2d 880 (Sept. 26, 1973).

The foundation for this confusion in the motion picture area was laid in this Court's treatment of the Lady Chatterly's Lover's appeal, reviewing the refusal of the New York Court of Appeals in *Kingsley International Pictures Corp. v. Board of Regents*, 175 N.Y. Supp. 2d 681 (July 24, 1957) to license the film "Lady Chatterly's Lover" as violative of Sections 122 and 122(a) of the New York Education Law. *Those sections required the denial of a license to a motion picture*, "...the dominant purpose or effect of which is erotic or pornographic; or *which portrays acts of sexual immorality, perversion, or lewdness*, or which expressly or impliedly presents such acts as desirable, acceptable or proper patterns of behavior. . . ." (Our emphasis)

Any opportunity for a logical development in the law that might have resulted from the June 21, 1973, decisions was completely destroyed by this irrational, illogical, preposterous, ridiculous, absurd, senseless, unreasonable and useless piece of dictum. Is this Court saying that hard-core pornography, which under federal law may not be imported, may have no property value, may not be copyrighted and which may not be sent interstate commercially, can nevertheless be given a legal status and value within a state? What of the expression in Roth-Alberts, 354 US 476, 485, 1 L.Ed.2d 1498, 77 S Ct 1304 (June 24, 1957) that it is the universal judgment of civilized nations as reflected in their international agreements, that obscenity should be restrained? Should not this Court be willing to explain away that statement by (1) backing into an acceptance of the Harlan view expressed in Alberts v. California, 354 US 476, at 500, and (2) admitting that what the Court was talking about was something less than hard-core pornography (reasonable men would not differ and could come to but one conclusion) and yet not quite protected speech. If the majority continues along this disruptive path, it will be underwriting another 15 years of chaos.

The 1959 Court reversed the New York Court's ruling in an opinion written by Justice Stewart. *Kingsley International Pictures Corp. v. Board of Regents*, 360 US 684, 3 L.Ed.2, 1512, 79 S.Ct. 1362 (June 29, 1959).[21] The issue as to "Lady Chatterly's Lover" was presented in the context of civil litigation - a licensing provision - which that Court, were it of a different bent, could have treated differently. Associate Justice VanVoorhis of the New York Court of Appeals, a

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[21] Associate Justice Stewart's opinion in Kingsley International Pictures Corp. v. Board of Regents, 360 US 684, 3 L.Ed.2d 1512, 79 S Ct 1362 (June 29, 1959), reversing the New York court's ruling (concurred in by Justices Brennan, Warren, Black and Douglas) is critically attacked by Terrence J. Murphy in his book, "Censorship: Government and Obscenity".

"The Court went out of its way to find in the New York statute a prohibition of nothing more than an abstract expression of an idea. By culling out of the opinion of the lower court and emphasizing such phrases as 'a proper pattern of behavior' Mr. Justice Stewart changed the New York law from a prohibition of the advocacy of sexual immorality plus obscenity to the prohibition of an intellectual discussion 'of the opinion that adultery may sometimes be proper, no less than advocacy of socialism or the single tax.' Mr. Justice Stewart notwithstanding, a movie advocating adultery and using all the techniques of sound, color and sight to depict or suggest obscene sequences is quite different both in its social effects and in its manner of presentation from a film presentation of Henry George's antiquated theory of a single tax. (Emphasis_____)

"The Court never met the argument that the state must protect 'order and morality.' New York argued that obscenity laws are ordered to the protection of the public interest in 'order and morality.' The corrupting influence on order and morality must be kept in mind in considering obscenity. To lose sight of the objective of the law by narrowly considering only the prurient appeal aspect of the obscenity law is to become so enamored with a means as to lose sight of the end. Obscenity is prohibited not just because it excites the sexual appetite but rather because such excitation has a 'corrosive effect upon the public sense of sexual morality.' The goal of the law is the protection of the public interest in order and morality. It cannot achieve this end if it does not concern itself with all the means by which the public order can be subverted. Consequently to hold as obscene that which is saturated with prurient sex while hold that material which advocates sexual immorality and is something less than saturated with prurient sex is not obscene is to close one avenue of attack on the community while opening up another route to the same destination. . ."

See clor, obscenity and public morality, 44-54.

dissenter in the state court below, would have solved the "thought control" problem which bothered Justice Stewart by holding at 175 N.Y. Supp.2d at 60:

> ". . .certain passages might have been eliminated as 'obscene' without doing violence to constitutional liberties. In their endeavor to censor morality, both the Motion Picture Division and the Regents seem to have *overlooked their power to exclude 'obscenity' which* includes the portrayal on the public screen of sexual intimacies *whether they be marital or extramarital*. . ." (Our emphasis)

Amicus submits that, had this Court's opinion in the "Lady Chatterly's Lover" case recognized the principle urged by Justice VanVoorhis, the producers of "Carnal Knowledge" would never have risked producing the acts of lewdness herein complained of. Further, the deluge of "lewdness" which now engulf the motion picture screens of this nation would not have appeared on the American scene. In his concurring opinion, Justice Tom Clark voiced a rationale somewhat similar to VanVoorhis, which was later to be followed by the New York Court of Appeal and elaborated upon in *Trans-Lux Distributing Corp. v. Board of Regents*, 248 N.Y.S.2d 857 (Mar. 26, 1964) and to find its way into Section 10 of the CDL Model Statute and ultimately into Section 26-2105 at page 1524:

> It may be as Chief Judge Conway said, "that our public morality, possibly more than ever before, needs every protection government can give." 4 NY2d at 363, 151 NE2d 204, 205, 175 NYS2d at 50. And, as my Brother Harlan points out, "each time such a statute is struck down, the State is left in more confusion." This is true where broad grounds are employed leaving no indication as to what may be necessary to meet the requirement of due process. *I see no grounds for confusion, however, were a statute to ban* "pornographic" films, or *those that "portray acts of sexual immorality, perversion or lewdness." If New York's statute had been so construed by its highest court I believe it would*

have met the requirements of due process. Instead, it placed more emphasis on what the film teaches than on what it depicts. There is where the confusion enters. For this reason, I would reverse on the authority of Burstyn. (Our emphasis)

Five years later, Justice Clark's statement of the law was adopted by a majority of the New York Court of Appeals as the principle under which a license was denied to the Swedish film "A Stranger Knocks". The latter film's only claim to fame was predicated upon two scenes depicting explicit sexual intercourse. The first took place on a beach. The second was a 2 minute scene of sexual intercourse, including climax, between the male lead lying on his back on the couch with the female lead astride and on top of him, but with both parties fully clothed and the female's skirt concealing the contact of the sex organs. Justice Burke, speaking for the majority in *Trans Lux Distributing Corp. v. Board of Regents* 248 N.Y.S.2d 857 (Mar. 26, 1974) expounded on that principle at great length.

"While typically applicable to 'speech' and 'press' in the forms known to the framers, the guarantee of the First Amendment has been read to include anything that is asserted to be someone's way of saying something. The most familiar instances of this application are physical conduct and motion pictures. (*Thornhill v. Alabama*, 310 US 88, 60 S.Ct. 736, 84 L.Ed. 1093, *Joseph Burstyn, Inc. v. Wilson*, 343 US 495, 72 S. Ct. 77, 96 L.Ed. 1092, supra). Cases involving conduct as a form of expression have been frequent in labor law and provide a useful illustration of the transition from a somewhat doctrinaire application of the First Amendment (see e.g., *Thornhill v. Alabama*, 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093, supra) to a realization that, while conduct may be speech, it still remains conduct and does not cease to present its unique problems of social control. It is now the law that even peaceful picketing may be forbidden where it violates State labor laws that are not themselves designed as restric-

tions on freedom of speech (Local Union No. 10, etc., *Plumbers Union v. Graham*, 345 U.S. 192, 73 S.Ct. 585, 97 L.Ed. 946). Conduct that is proscribed for valid public purposes is not immune merely because engaged in with a view to expression (*Giboney v. Empire Ice & Storage Co.*, 336 U.S. 490, 69 S.Ct. 684, 93 L.Ed. 834). For example, in *People v. Stover*, 12 N.Y.2d 462, 240 N.Y. S.2d 734, 191 N.E.2d 272, supra, app. dsmd. for want of a substantial Federal question, 375 U.S. 42, 84 S.Ct. 147, 11 L.Ed.2d 107, this court upheld an 'Aesthetic' ordinance prohibiting the display of soiled laundry on a clothesline in the defendants' front yard, despite the fact that the display was an expression of social protest.

"Films, by their nature, may lie on either side of the division between speech and conduct. The opinions of the Supreme Court reversing this court in the cases of advocacy of adultery and thematic sacrilege make that plain. But it also follows that if 'picketing may include conduct other than speech, conduct which can be made the subject of restrictive legislation' (*Giboney v. Empire Ice & Storage Co., supra*, 336 U.S. p. 501, 60 S.Ct. p. 690, 93 L.Ed. 834) then so may films. In this regard, it will be noted that the Supreme Court has not yet expressed its opinion in a case involving allegedly obscene behavior on the screen. . . ."

and at page 860:

"In *Kingsley International Pictures Corp. v. Regents*, 360 U.S. 684, 79 S.Ct. 1362, 2 L.Ed.2d 1512, the opinion of the court repeatedly distinguished between the right to communicate any idea, however deviant from orthodoxy, and 'the manner of its portrayal' (360 U.S. p. 688, 79 S.Ct. p. 1365, 1 L.Ed.2d 1512). The 'freedom to advocate ideas' was protected, not any supposed right to behave lewdly in a public place. Even more to the point is the concurring opinion of Mr. Justice Clark who wrote: 'I see no grounds for con-

fusion, however, were a statute to ban "pornographic" films, or those that "portray *acts* of sexual immorality, perversion or lewdness." If New York's statute had been so construed by its highest court, I believe it would have met the requirements of due process. Instead, it placed more emphasis on what the film teaches than on what it depicts. There is where the confusion enters.' (350 U.S. p. 702, 79 S.Ct. p. 1372, 3 L.Ed.2d 1512; emphasis in in original).

"It is my view that a filmed presentation of sexual intercourse, whether real or simulated, is just as subject to State prohibitions as similar conduct if engaged in on the street. I believe the nature of films is sufficiently different from books to justify the conclusion that the critical difference between advocacy and actual performance of the forbidden act is reached when simulated sexual intercourse is portrayed on the screen. I take it to be conceded that New York may constitutionally prohibit sexual intercourse in public. As Mr. Justice Douglas acknowledged, dissenting in *Roth v. U.S.* . . . .in contrasting books with conduct: 'I assume there is nothing in the Constitution which forbids Congress from using its power over the mails to proscribe *conduct* on the grounds of good morals. No one would suggest that the First Amendment permits nudity in public places, adultery, and other phases of sexual misconduct' (Emphasis in text).

"This observation is equally pertinent, of course, whether the sexual exhibitionism is done spontaneously in the street or in theaters for money (e.g., Penal Law, Consol. Laws, c.40, §§ 43, 1140, 1140-a, 1140-B). There have been many cases dealing with what sort of behavior was covered by statutes against sexual exhibitionism and the like, but they were solely concerned with statutory interpretations, never, obviously, the First Amendment. *(Miller v. People*, 5 Barb. 203; *People v.*

Burke, 243 App. Div. 83, 276 N.Y.S. 402, affd. 267 N.Y. 571, 196 N.E. 585; *People v. Mitchell*, 296 N.Y. 672, 70 N.E.2d 168; *People v. Dash*, 282 N.Y. 632, 25 N.E.2d 979.)

"This comparison between the acknowledged competence of the State to forbid public or semi-public sex displays and its power to exert similar control over similar conduct depicted on the screen is not intended to imply any broad theory of legal equivalence between real conduct and a filmed imitation. Indeed, the meaningful comparison exists only in a narrow range of cases. In most instances, the real conduct is illegal because of what is accomplished by the person, as in murder, forgery, or adultery. In such cases, the filmed dramatization obviously does not share the evil aimed at in the law applicable to the real thing. Where, however, the the real conduct is illegal, not because of what is accomplished by those involved, but simply because what is done is shocking, offensive to see, and generally believed destructive of the general level of morality, then a filmed simulation fully shares, it seems to me, the evil of the original. In such cases, the free expression protection of the First Amendment must apply to both or neither. It makes no sense at all to say that the conduct can be forbidden but not the play or film.

"The pattern of statutory regulation in New York aims at offensive – more properly, obscene – displays of conduct whether in the street (Penal Law §§ 43, 1140 1140-b), on the stage (Penal Law, § 1140-a; *People v. Vickers*, 259 App. Div. 841, 19 N.Y.S.2d 165 – lewd dance) or on the screen (Penal Law §§ 1140-a, 1141; Education Law, § 122). These laws care not about the communication of ideas (see *Stromberg v. California*, 283 U.S. 359, 51 S.Ct. 532, 75 L.Ed. 1117); they are aimed at certain narrow sorts of conduct. It seems to me, therefore, that if the defendants in *People v. Stover*, supra, could constitutionally be prohibited from selecting the forbidden form of conduct as the vehicle

for the communication of their protest, then this petitioner cannot choose acted-out sexual intercourse as the vehicle for its art (see, also, *People v. Vickers*, supra, where a performer was prohibited from choosing a certain sort of dance as her vehicle, and the 'nude gymnasium' prohibited by Penal Law §§ 1140-b). Numerous other instances also suggest themselves.

"If we can accept the obvious – that sexual intercourse whether performed in the park or simulated on the stage or screen is in itself a form of conduct (in which the public have an interest), it is apparent that when this defendant chooses to use it as a vehicle for the expression of art it has 'brigaded' the communication (to the extent that it is 'communication') with conduct completely. In so doing the petitioner has subjected itself to such regulations as are appropriate to the conduct when engaged in for reasons having nothing to do with expression. There is otherwise no difference between advocacy and action. (Compare *Thornhill v. Alabama*, 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093, with Local Union No. 10, etc., *Plumbers Union v. Graham*, 345 U.S. 192, 73 S.Ct. 585, 97 L.Ed. 946.) 'Freedom of expression can be suppressed if, and to the extent that, it is so closely brigaded with illegal action as to be an inseparable part of it' (Douglas, J., dissenting in *Roth v. United States*, 354 U.S. 476, 514 77 S.Ct. 1305, 1324, 1 L.Ed.2d 1498)."

Judge Burke's closing principle at page 863 is a fitting Memorial to Carnal Knowledge:

"To all argument predicated on artistic merit as decisive of the constitutional question, it is sufficient answer to say that artists are not such favorites of the law that they may ply their craft in the teeth of a declared over-riding public policy against pornographic displays. Since no other profession is privileged to bend public morals, policy and law to its internal craft standards, then neither should producers of films."

This Court was presented with a second opportunity to undercut the advance of pornography in the motion

picture industry during the 1964 October Term. Instead of granting a hearing and coming to grip with this very real issue in the Trans-Lux case, the 1964 Court chose instead to hear the appeal in *Freedman v. Maryland*, 380 U.S. 51, 13 L.Ed.2d 649, 85 S.Ct. 734 (Mar. 1, 1965), struck down the Maryland Censor Board statute and summarily reversed *Trans-Lux*, citing *Distributing Corp. v. Board of Regents*, 380 U.S. 2d 59, 13 L.Ed.2d 959, 85 S.Ct. 952 (Mar. 15, 1965).[22]

Amicus submits that the Lady Chatterly's Lover case must be *re-examined*. The Federal questions spawned by that rationale present problems of infinite dimensions. If this Court does not roll back the pages of history to correct its omissions in the Lady Chatterly's lover case, there will be nothing to stop those scenes from next appearing on television.[23]

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[22] For failure of this Court to enunciate a judicial philosophy in conformity with traditional moral law, this Nation finds its public mores in the year 1974 – 15 years after the "Lady Chatterly's Lover" decision and 9 years after the "A Stranger Knocks" ruling – in a state of collapse, and the motion picture industry dominated by pornographers and ruled by anarchy. With Kingsley International Pictures Corp., supra, as the foundation, and this Court's inaction in Trans-Lux Distributing Corp., supra, providing the mortar, pornographers have constructed a modern-day version of the Tower of Babel within the motion picture industry.

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[23] On February 18 and 19, 1974, the daily newspapers reported on the abrupt dropping from ABC's schedule for Tuesday, March 5, 1974, the Movie of the Week, entitled "The Sex Symbol," allegedly for "Lavish hints of nudity, an aura of neurotic eroticism. . ." In commenting on the cancellation, Connie Stevens, the female star, who allegedly had engaged in the TV nudity, is reported to have said:

> " 'Can you imagine,' she asks. "Can you just imagine? People are turning my head around, saying, this will turn my career around as 'Carnal Knowledge' did Ann-Margret's. And I'm devastated.' "

Los Angeles Herald-Examiner article dated Feb. 18, 1974 and Los Angeles Times article dated Feb. 19, 1974, at Appendix Q, pages 3 and 4.

E. The Imposition of Criminal Sanctions Incident to a Violation of Section 26-2105 Raises no First Amendment Problems.

(1) THE FIRST AMENDMENT STANDARDS SET FORTH IN MILLER v. CALIFORNIA (WHICH INVOLVED AN APPLICATION OF THE CALIFORNIA GENERAL OBSCENITY STATUTE TO WRITTEN MATERIALS) HAS NO APPLICATION TO A SPECIAL STATE STATUTE WHICH REGULATES VISUAL FILMED CONDUCT AND WHICH PROVIDES THAT SPECIFICALLY DEFINED SEXUAL CONDUCT MAY NOT BE PHOTOGRAPHED ON FILM OR EXHIBITED PUBLICLY, AND THAT CRIMINAL SANCTIONS SHALL BE APPLIED AGAINST A PERSON WHO EXHIBITS SUCH FILMS WITH KNOWLEDGE THAT THE PROSCRIBED SEXUAL CONDUCT IS THEREIN DEPICTED.

When this Court stated in *Paris Adult Theatre I v. Slaton*, 413 US 49, 37 L.Ed. 2d 446, 464, 93 S. Ct. 2628 (June 21, 1973):

> "...in this case we hold that the States have a legitimate interest in regulating commerce in obscene material and in regulating exhibitions of obscene material in places of public accommodation, including so-called 'adult' theaters from which minors are excluded. In light of these holdings, nothing precludes the State of Georgia from the regulation of the allegedly obscene materials exhibited in Paris Adult Theatre I or II, provided that the applicable Georgia law, as written or authoritatively interpreted by the Georgia courts, meets the First Amendment standards set forth in *Miller v. California*, supra, US at , 37 S.Ct. 2d 431. The judgment is vacated and the case remanded to the Georgia Supreme Court for further proceedings not inconsistent with this opinion and *Miller v. California*, supra. . . ." (Our emphasis).

it mixed up apples (general obscenity statute involving *criminal* sanctions in *Miller)* with oranges (general obscenity statute in-

volving *prospective civil injunction in Paris Adult Theatre I)* and came by a result which engenders confusion. See Petition for Rehearing of Charles H. Keating, Jr. *in A Motion Picture Film Entitled Vixen, Russ Meyers, Eve Productions, Inc., Malibu Inc. and Clarence P. Gall v. State of Ohio ex rel Charles H. Keating, Jr.*, No. 71-599, filed July 19, 1973.

Such inconsistencies, however, are of minor significance where the subject of the inquiry is the facial constitutionality of Georgia Code Section 26-2105, standing alone and independent of the "pari materia" statutory construction placed upon it by the Georgia Supreme Court (See "Introduction", supra, at page 35), for in such a case *Miller v. California*, supra and *Paris Adult Theater I v. Slaton*, supra, are inapposite.

On its face, Section 26-2105 makes no reference to the general obscenity statute "distributing obscene materials", Georgia Code Section 26-2105, which by its terms ("materials") encompasses a much wider area of activity such as writings, use of words, etc. Section 26-2105 is a special statute whose application not only is limited to conduct, but is further restricted to that type of conduct which is visual. Considered in the context of this case, that statute deals only with *pictorial conduct* and provides that specifically defined sexual conduct may not be photographed on film or exhibited, and that criminal sanctions shall be applied against a person who exhibits such film with knowledge that the proscribed sexual conduct is therein depicted. Considering Section 26-2105 by itself, and independent of the "pari materia" construction place upon it by the Georgia Supreme Court, it seems abundantly clear that the broad rule laid down by this Court in *Miller v. California*, supra, and *Paris Adult Theatre I v. Slaton*, supra, involving *obscene materials* cannot logically be applied so as to limit the applicability of that statute.

In his criminal law classes, Professor Rollin M. Perkins made constant use of the hypothetical to place the focus on an inconsistent line of reasoning, a procedure which is of particular value here. That learned professor might say: Suppose that the State of Georgia, with a sodomy statute like Georgia Code Section 26-2002 which provides:

> "A person commits sodomy when he performs or submits to any sexual act involving the sex organs of

one person and the mouth or anus of another. . .a person convicted of sodomy shall be punished by imprisonment for not less than one nor more than twenty years. . ."[24]

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[24] On November 5, 1973, this Court unanimously reversed Stone v. Wainwright, ___ US ___, 50 L.Ed.2d 179, ___ S Ct ___, and in so doing, wrote a "finis" to another broad attack on Judaeo-Christian morals (sodomy crime.) In the lower court in Stone v. Wainwright, 478 F.2d 390 (Apr. 29, 1973), the Fifth Circuit (Goldberg, Thornbury and Roney) had granted writs of habeas corpus to Stone and Huffman, who were serving 10-year sentences on Florida sodomy convictions. This Court reversed unanimously and, without the need for oral argument on the merits, held that the offense which is described as "the abominable and detestable crime against nature" put the defendants on clear notice that their conduct was criminal at the time the Statute had been construed.

More significant than this Court's ruling was the complexion of Stone v. Wainwright, which was being appealed to the U. S. Supreme Court. In Franklin v. State of Florida, 257 So.2d 21 (1971), the Florida Supreme Court had held the Florida Sodomy statute, unconstitutionally vague but, in reversing Franklin's conviction, the Florida Supreme Court also had ruled that the decision was not retroactive. On Stone and Huffman's petition for writ of habeas corpus, Federal District Judge McRae and the Fifth Circuit disagreed with the Florida Supreme Court, and granted the writ on the independent federal grounds that the Statute was void under the Federal Constitution.

In Amicus' view, the Florida Supreme Court, long recognized as a court which is committed to high public moral standards, (see Rhodes v. Florida, 283 So.2d 351 (Sept. 19, 1973)), was seduced by the lack of moral leadership and misdirection of this Nation's highest court. See Brinson v. State of Florida, 278 So.2d 317 (May 17, 1973) wherein the Florida District Court of Appeals, First District, refused to follow the direction of the Franklin case and reestablished the act of sodomy as a felony criminal offense under the general classification of "rape". Amicus submits that the sustained attack which has been made on the sodomy crime in recent years, see Stone v. Wainwright, 478 F.2d at 393, fn.6, would never have come about had the Justices of this High Court been more sensitive to public morals in their review of obscenity cases and more committed to "a return to the ancient, if somewhat discredited, concept of natural law." See Lovisi v. Slayton, Superintendent of the Virginia State Prison, 363 F.Supp. 620, at 624 (Aug. 31, 1973) and Lovisi v. Virginia, Nos. 71-965 and and 71-993, cert. denied in Lovisi v. Virginia, 405 US 1048, 31 L.Ed.2d 589, 92, S Ct 1313 (Apr. 3, 1972). Douglas would grant cert. The indirect tolerances of films like "Deep Throat," "The Devil In Miss Jones" and "Behind the Green Door" which depict repeated acts of sodomy is unnatural, scandalizing and solicits disruptive legal attacks on, what has always been accepted as, fundamental moral standards, of the nature made in Stone v. Wainwright and by Billy Jenkins in his operation of the Broad Avenue Cinema, described herein at pages 16-17.

were to direct its legislative efforts toward controlling the plague which pornographic films like "Deep Throat" [25] have cast upon the nation, by adding a new subsection to Section 26-2105 reading:

> "26-2105(x) Every person who, during the course of a. . .motion picture. . .production . . . engages in conduct wherein said person, as an actor, performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another. . . shall be guilty of participating in indecent exposure and upon conviction shall be punished as for a misdemeanor. . ."

and by adding a new subsection to section 26-2105 reading:

> "26-2105(y) Every person who. . .knowingly exhibits or . . .assists in the exhibition of a motion picture containing the conduct described in Section 26-2105 shall be guilty of a misdemeanor. . ."

And suppose further, that John Doe thereafter exhibits "Deep Throat" with knowledge of its contents and is thereafter indicted and convicted on a specific grand jury charge of violating Georgia Code Section 26-2195(y)," in that he did with knowledge of the contents exhibit a film containing conduct wherein one female, identified as Linda Lovelace, did perform multiple acts of oral sodomy by the use of her mouth on the penis of other male actors, which conduct was continued to the point of ejaculation." query: Would it have been error for the trial judge to fail to instruct on the definition of obscene material set forth in Georgia Code Section 26-2101(b), as that definition may be affected by *Miller v. Calif.*, et al, supra? If this Court answers "yes", Amicus would further inquire why this must be so, where the hypothetical statute and charge has nothing directly to do with the general obscenity statute.

Is this Court willing to say that, on the above facts, the jury must nevertheless be instructed on "prurient interests",

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[25] See Brief Amicus Curiae of Charles H. Keating, Jr. in Paris Adult Theatre I v. Slaton, No. 71-1051, and the Time-Motion Study of "Deep Throat" at Appendix C-1 thru C-29, depicting 62 minutes of multiple acts of oral sodomy exemplified by photos 529-558 therein, depicting oral copulation of a male penis in the mouth of a female.

"patently offensive way", and "serious literary, artistic, political, or scientific value "before it can return a guilty verdict? If this Court answers "yes", Amicus then would ask, "Does not the feloneous crime of sodomy make the act "patently offensive" as a matter of law? Further, of what probity is "serious literary, artistic, political or scientific knowledge", except as a possible affirmative defense in a proper case? See Section 2 of the CDL Model Obscenity Statute at Appendix F, page 4, and Comments on the Model Obscenity Statute Appendix G, page 5-6, and 10.

Amicus submits that, for this Court to hold that Section 26-2105(b) is facially invalid and may not, in the light of constitutional standards, be applied independently of the general obscenity statute is without basis in legal or ordinary logic and, if acceded to by this Court, would compound the existing confusion.

(2) GEORGIA CODE SECTION 26-2105 PROVIDES FAIR NOTICE TO A FILM EXHIBITOR THAT HIS PUBLIC AND COMMERCIAL ACTIVITIES MAY BRING PROSECUTION.

In *Rabe v. Washington*, 405 US 313, 31 L.Ed. 2d 258, 261, 92 S.Ct. 993 (Mar. 20, 1972), this Court reversed an obscenity conviction on the grounds that "the Statute, used to support the conviction had not given 'fair notice' that the location of the exhibition was a vital element of the offense." In further explanation of that principle, this Court said in *Miller v. California*, 413 US 15, 37 L.Ed. 2, 419, 432, 93 S.Ct. 2607 (June 21, 1973).

> "Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct specifically defined by the regulating state law, as written or construed. . ."

Georgia Code Section 26-2105 contains no such infirmities as were present in Rabe, supra, and satisfies the "fair notice" requirements of this Courts' decisions on June 21, 1973.

The conduct which is made illegal by Georgia Code Section 26-2105 is described as conduct which would be public indecency under Section 26-2011. Section 26-2011 describes four specific acts which come within the Statutes proscription, namely:

(a) An act of sexual intercourse
(b) A lewd exposure of the sexual organs
(c) A lewd appearance in a state of partial or complete nudity
(d) A lewd caress or indecent fondling of the body of another person

There can be little doubt that such language satisfies the requirement that the conduct be specifically defined. The very purpose of the 1968 Amendment, under which the specific language was first introduced to the Code Section, was "to substitute explicit conduct which falls within its proscriptions for the rather vague 'tending to debauch the morals' formerly employed." See Committee Notes on Chapter 26-20 appearing in Georgia Code Ann. Section 26-2011 at page 153.

Except for the act of sexual intercourse, the designated acts must be performed in a lewd manner before they constitute public indecency. The term "lewd" has a well defined meaning under the law and its use in a "conduct statute" raises no substantial federal question. See *Piercy v. Georgia*, 92 Ga App. 599, 600 (1955); *Evans Theatre Corp. v. Slaton* 180 S.E. 2, 712 at 715, citing *Chaplinsky v. New Hampshire* 315 US 568, 571-572, 62 S.Ct. 766, 86 L. Ed. 1031.

Any question as to whether, under state law, the proscription as to an "act of sexual intercourse" included simulated sexual activity was fully answered in *Slaton v. Paris Adult Theatre I*, 185 S. E. 2d 768 at 770, (November 5, 1971):

> Appellee also contends, and the trial judge so found that the sexual activity depicted in these films is merely simulated, and that, being such, it is not obscene. This contention we unhesitatingly and utterly reject. True, the activity in the films here involved is not revealed in the explicit detail embodied in the films in the Walter

case. But, we held in the Evans Theater case that, "I Am Curious Yellow," depicted hard core pornography. In that case, only simulated sexual activity was involved. The films in this case leave little to the imagination. It is plain what they purport to depict, that is, conduct of the most salacious character. We hold that these films are also hard core pornography, and the showing of such films should have been enjoined since their exhibition is not protected by the first amendment.

II.

GEORGIA CODE ANNOTATED SECTION 26-2101, AS CONSTRUED AND APPLIED BY BOTH THE GEORGIA TRIAL COURT AND THE GEORGIA SUPREME COURT, DOES NOT VIOLATE THE FEDERAL CONSTITUTION.

A. Jenkins was Accused and Tried by the State of Georgia on a Violation of Georgia Code Section 26-2101(a). He was not Accused nor was he Tried on a Violation of Georgia Code Section 26-2105(b).

As previously observed, at pages 32-33, under Point I of this Brief, while it is true that Jenkins was arrested on Feb. 10, 1972, on a charge of violating Georgia Code Section 26-2105 (J.A.6), he was neither indicted by the grand jury nor tried by the petit jury on that charge. Instead, he was indicted by the March Term of the Grand Jury on an accusation of "Distributing Obscene Materials" [28] (J.A. 7,8)–a violation of Section 26-2101(a) of the Georgia Code. If he had been ac-

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[28] As correctly noted by Appellant in his Brief at page 35, footnote 44, section 26-2101(b) and sections 26-2105(a) and 26-2105(b) are separate, statutory crimes having separate and different penalty provisions. Appellant is incorrect, however, when he concludes thereafter that "it is impossible to determine which provisions now govern." When Section 26-2105 functions as a criminal statute proscribing conduct, the Section 26-2105 penalty provisions control. When Section 26-2105 functions as a specific standard of conduct in the determination of whether any given material is obscene or not under the general obscenity statute, the Section 26-2101(d) penalty attaches.

cused by the Grand Jury of the separate crime described in Section 26-2105, the issues upon the trial would have been entirely different.[27] In as much as the Grand Jury Indictment as framed, did not present that particular problem (where the indictment would be against conduct alone, under section 26-2105, and not in relation to "distributing obscene material,"), the Georgia Supreme Court did not consider it. Therefore, neither the facial validity of Section 26-2105 nor its application to the film "Carnal Knowledge" can be made the foundation for this appeal. (See Statement of Facts, supra, at page 7)

The Brief for Appellant is in error when it states at page 30: "Appellant was charged with and tried for a violation of Georgia Code Annotated, section 26-2105" and at page 43, that "Appellant was accused only of violating Georgia Code Annotated section 26-2105 (exhibition of a film portraying acts which constitute 'public indecency')." As noted above, Appellant was charged with and tried for a violation of Georgia Code section 26-2101(a). The jury instruction as to Georgia Code section 26-2105 (and as to the other criminal statutes governing *conduct*, sections 26-2101(c) and 26-2011) was given for the purpose of informing the jurors on the *specific standards of conduct* set for the state community by the State Legislature. That statement served as a guidepost for the jurors deliberations on the general charge of distributing obscene material.

Appellant's error in this regard is twofold. First, he refuses to read the plain language of the accusation and the trial judge's instructions as meaning what they say. Secondly, he refuses to acknowledge that the rationale of this Court's decision in *Miller v. Calif.* 413 US 15, 37 L.Ed.2 419 at 431,

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[27] For an example of the type of trial which could result from a grand jury accusation under Georgia Code Section 26-2105, as that section was intended by its author to operate, see the hypothetical example set forth at pages 52-55, supra. The answer to those who might argue that this is a retreat to the Hicklin rule appears in the basic principle expressed by Justice Burke's opinion in the Trans-Lux case, set forth at the bottom of page 49 and at page 12, footnote 9. Where the triable issue is narrowly focused on conduct, the confusion in values alluded to at footnote 21 on page 43, disappear.

93 S. Ct. 2607 (by mandating that the trier of fact must be given basic guidelines as to what sexual conduct is specifically defined as patently offensive) has confirmed the correctness of the construction given the Georgia Statutes by the trial court, and his manner of instructing the jury. In casting the spotlight upon the entire framework of morality laws, the *Miller* decision has unearthed one very basic and obvious principle, and that is, that all morality legislation functions in two separate capacities. As criminal legislation, such statutes "proscribe" certain conduct as illegal. At the same time, such legislation in its written form (being the enshrinement of the voice of the people) "prescribes" – that is, lays down a guide which can and must be given to the jury in proper cases to be used by them as litmus paper in arriving at their factual determinations on a general obscenity charge.[28]

Nor can Jenkins claim that he was not aware that he was being charged with a violation of Section 26-2101(a). His entire defense, consisting of the sworn testimony of Ed Lightsey, B. C. Gable, Barbara Folsom, Joan Singletary, and his own unsworn statement (see pp. 25-29) was aimed at establishing proof of "community standards" which would

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[28] Webster's Collegiate Dictionary, Fifth Edition, defines proscribe as . . . "to outlaw . . . To denounce and condemn;" prescribe as . . . "to lay down as a guide, direction or rule of action."

In the Brief Amicus Curiae of Charles H. Keating Jr. in Paris Adult Theatre I v. Slaton No. 71-1051, at pages 89-93, (See copy, herein, at Appendix R, pages 3-7) Amicus urged this basic principle upon the Court in a different context. There Amicus urged the Court to take judicial notice of the "guidelines" established by this nation's morality (sexual) laws (as the Ohio Courts have done) and apply the same (see Appendix P at pages 2-16) as a standard in affirming "Magic Mirror" and "It All Comes Out In The End" as obscene under federal standards. This Court rejected that proposal and, instead, sent all of the obscenity cases which were before it back to the state courts below with a directive that they perform that task either through judicial construction or legislation, without actually explaining how it was to be accomplished. Whether that action amounts to a national scandal which has added a nail to this nation's coffin, or was brilliant planning which, with further refinements, will start this nation moving in the proper direction, will be decided by the manner in which this Court writes its opinion in this appeal. The trial judge applied the law as this Court said it should be applied. The question is, will this Court <u>now</u> start construction upon this solid foundation?

win him an acquittal. He made no attempt in either the sworn testimonial evidence of others or in his own unsworn statement to offer proof on a defense to Section 26-2105(b), such as, that the film did not contain acts which could be held to be public indecency or that he had no knowledge of the portrayal of such acts in the film itself.

Finally, the judge's instructions to the jury were clear that he was being tried on a Georgia Code Section 26-2101 accusation. (J.A. 26-30) see Joint Appendix at page 26:

> "Gentlemen of the Jury, an accusation has been returned accusing this Defendant of the offense of distributing obscene material. You will have the accusation out with you. It is not evidence, but you may refer to the accusation if you care to do so containing as it does the contentions of the State. . . ." (Our emphasis.)

and Joint Appendix at page 30:

> "A person commits the offense of distributing obscene material when he sells etc. . . ." Contents of Georgia Code Section 26-2101(a).) (Our emphasis.)

B. In His Instructions on the Law Governing the Substantive Crime of "Distributing Obscene Materials," the Trial Judge used the very Principles now Mandated by This Court's Decision in Miller v. Calif. Et. Al.

The trial judge's instructions on the substantive crime of "distributing obscene materials" are embodied in the seven paragraphs which appear at pages 30-31 of the Joint Appendix. Those instructions to the jury as the "trier of fact" fully comport with the rule of law handed down by this Court in *Miller v. California, supra*, at page 431, that:

> "The basic guidelines for the trier of fact must be . . . (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law . . . ." (Our emphasis)

Analytically speaking, the trial judge's instructions were structured in seven integrated parts:

1. A statement as to what the elements of the offense of "distributing obscene materials" were, and what factual issues were before the jury for its considera-

tion, framed in the language of Georgia Code Section 26-2101(a). [29]

2. A statement as to the statutory test for "obscene material," framed in the language of Georgia Code Section 26-2101(b).
3. A statement as to the *specific standard of conduct* relating to the commercial exploitation of erotica solely for the sake of its prurient appeal and its consequences where found to exist from the evidence prescribed by Georgia Code Section 26-2101(c).
4. A statement as to the *specific standard of conduct* which forbids the photographing on film of conduct which would be public indecency, if performed in a public place, prescribed by Georgia Code Section 26-2105(a).
5. A statement as to the *specific standard of conduct* which forbids the knowing exhibition of films containing conduct which would be public indecency if performed in a public place, prescribed by Georgia Code Section 26-2105(b).
6. A statement as to the *specific standard of conduct and acts* which, when performed in a public place, constituted public indecency under the law, prescribed by Georgia Code Section 26-2011, and
7. A precautionary instruction to the effect that *the question before the fact finders "is not whether the particular publication depicts sex or sexual acti-*

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[29] The constitutionality of Georgia Code Section 26-2101(a) is beyond question. Gable v. Jenkins, 309 F. Supp. 998, affirmed on the merits 397 US 592, 25 L.Ed.2d 595, 90 S.Ct. 1351 (April 20, 1970). In Paris Adult Theatre I v. Slaton, 413 US 49, 37 L.Ed.2d 446,453, 93 S.Ct. 2628 (June 21, 1973) this Court made the following comment on the constitutionality of Georgia Code Section 26-2101 at footnote 1:

"The constitutionality of Georgia Code Section 26-2101 was upheld against First Amendment and due process challenges in Gable v. Jenkins, 309 F. Supp. 998 (N.D.Ga. 1970), aff'd per curiam, 397 US 592, 29 L.Ed.2d 595, 90 S. Ct. 1351 (1970)."

See also Slaton v. Paris Adult Theatre I, 201 S.E.2d 456, 459 (Oct. 30, 1973) affirming, upon remand from this Court, the Georgia Supreme Court's previous construction of Section 26-2101(a).

vities,[30] *but the question is whether the movie can be said to be obscene within the narrow limits as the law has heretofore defined such limits as to take the movie outside the protection of the person involved." (Our emphasis.)*

Under the trial judge's first two statements, noted above, the jury (1) was informed that the nature of the accusation was that of knowingly exhibiting obscene material and (2) was given the definition of the term "obscene material" (J.A. 30). During the case in chief, the jurors had viewed the film "Carnal Knowledge" which contained several scenes depicting explicit sexual activity. Two examples of such depictions are:

(a) Scene 37 (See Continuity at A-78 thru A-84 and Time-Motion Study at B-24 thru B-27) which presented a five minute scene in which a prostitute Louise performed fellatio (simulated) on Jonathan in his apartment). Of those five minutes, 2 1/2 minutes are devoted to the depiction of the felonious act of sodomy itself. (See A-80 thru A-84 and B-24 thru B-27 at Photographs 701-756.)

(b) Scene 6 (See Continuity at A-14 thru A-15 and Time-Motion Study at B-4 thru B-5) which presented a 23 second scene in which Sandy is shown placing his hand on Susan's breast, after telling Jonathan that he was going to "feel her up" and a one minute scene in which Susan herself takes Sandy's hand and places it on her breast. (See A-14 thru A-15 and B-4 thru B-5 at Photographs 67-69 and 77-96).

In view of such trial facts indicating explicit sexual activity on film, it became the duty of the trial judge to instruct the jury on those specific standards of conduct set by the Legislature which bore a relationship to the explicit sexual

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[30] This precautionary instruction clearly demonstrates that the Court was not instructing the jury on the substantive crime set forth in Georgia Code Section 26-2105(b). In an indictment for a violation of Section 26-2105, such as along the lines of the hypothetical case set forth at pages 52-55, the instruction noted here would have been an incorrect statement of the law.

activity on film. In deliberating upon the Grand Jury accusation against Jenkins of "distributing obscene material" (Section 26-2101(a)) the petit jury was faced with the duty of making a number of factual determinations which included (1) a determination of and application of community standards to the film; (2) a determination of what, under those standards, constituted a shameful or morbid interest in nudity, sex or excretion, and (3) a determination of what were the customary limits of candor in describing or representing such matters. As a part of the law on those questions, the jury was entitled to be informed as to the legislative voice of the people, regarding the public exhibition of films showing:

(a) an act of sexual intercourse, and

(b) a lewd caress or indecent fondling of the body of another person.

as enshrined in Senate Bill 108 and Section 26-2105(b).

One of the issues for the jury to resolve was whether or not Jenkins had "knowingly exhibited an obscene film. As a part of the instruction on Section 26-2101, the jurors had been told that "knowingly":

> "As used herein shall be deemed to be either actual or constructual knowledge of the obscene content of the subject matter and the person has constructive knowledge of the obscene content if he has knowledge of the fact which would put a reasonable and prudent man on notice as to the suspected nature of the material. . ."

Other evidence was that Jenkins had made an unsworn statement, as follows: (Statement of Facts, supra, at page 28)

> "As far as the motion picture 'Carnal Knowledge' is concerned, I have no knowledge of this motion picture being obscene or *breaking any state or local law because of its content*. . ." (Our emphasis.)

The rebuttal evidence of Investigator Lynn Stout was: (Statement of Facts, supra, at page 30) that some time after July 1, 1971, he started making an investigation of the Broad Avenue Cinema and other theaters and took photographs of the content of the public screen. He thereafter identified 9

photos of explicit sexual activity photographed at Jenkin's Theater on July 4, 12, 14 and 22nd, which were offered by the State of Georgia as impeachment on the question of "knowledge". It was also made known to the jurors, by stipulation that "Carnal Knowledge" had previously been shown at the Martin Theater and that the same had been seized under a search warrant and an agreement had been entered into whereby the picture was not to be shown in Albany, Georgia unless there was a judicial determination. In view of the trial facts indicating a course of conduct regarding explicit sexual displays, and a willingness to show a film which was being challenged for its sexual content, the jury was entitled to be informed as to the legislative voice of the peoples regarding the "commercial exploitation of erotica solely for the sake of their prurient appeal." Section 26-2101(c).

Appellant's objection to the charge at page 32 of his Brief, that:

> "The trial judge's instructions to the jury encompassed three, separate, distinct and substantially different statutes, all of which were applied unconstitutionally in this case . . . ."

blinks at reality. It is not error for the trial court to read statutes in its instructions if the statutes read are pertinent, are justified by the evidence, and where their meaning as applied to the facts in the case is not susceptible of more than one construction. 88 C.J.S. Section 337 Trial, at page 881-882. The latter requirement was met by the precautionary instruction to the effect that:

> "The question present with regard to the obscenity of the movie herein is not whether the particular publication depicts sex or sexual activities, but the question is whether the movie can be said to be obscene within the narrow limits as the law has heretofore defined such limits as to take the movie outside of the protection of the person involved."

The reference to "sex or sexual activity" can have but one application and that is to the conduct statutes (sections 26-2011, 26-2101(c), 26-2105(a) and 26-2105(b)) which

make no mention whatsoever of the legal term "obscene movie."

Appellant's difficulty is that the trial judge and the Georgia Supreme Court construed the network of statutes regarding sexual conduct and obscene materials in pari materia, which is a display of the utmost common sense. See footnote 28. Appellant's "divide and conquer" approach, should not be permitted to defeat the most practical development [31] in the law of obscenity in 15 years (since *Roth-Alberts*, 354 US 476, 1 L.Ed.2d 1498, 77 S.Ct. 1304 (June 22, 1957).

C. The Trial Judge's Instruction That the Jury was to Apply "Community Standards" did not Violate the Federal Constitution.

The trial judge instructed the jury in the terms of the statute, Georgia Code Annotated, Section 26-2101(b): (J.A.30)

"Material is obscene if considered as a whole,

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[31] Amicus submits that, properly implemented, this Court's opinions in Miller v. California et al., supra, as implemented herein could eventually lead the way out of the forest. (See Interest of Amicus at p. 3.) If obscenity is to be brought under control, the determiners of fact, be they judge or jury, must bring their sights to bear on what truly are the "standards of conduct" which they are called upon to use as a litmus. The trial judge construed the obscenity statutes as a whole, which had the effect of instructing the jury on the moral standards of the state. As previously noted in another context at Point IA (p 33), it beggars logic to say that an act of sodomy is punishable as a felony and, at the same time, hold that a pictorial display of oral sodomy, real or simulated, may not be reached by legal sanctions. Similarly, it would be equally as illogical to hold that, in a trial on a general obscenity charge involving a film like "Deep Throat," which depicts 62 minutes of multiple acts of oral sodomy (see footnote 25), that it was improper for the trial judge to instruct as a specific standard of conduct that the jurors might consider on the issue of "standards of the community" the fact that the State Legislature had declared the act of sodomy to be a felony, subject to 10 years imprisonment. For the same reason the trial judge in Jenkins properly read as a standard of conduct, the legislative command of Section 26-2105(a) that the act of sexual intercourse was not to be photographed, and the legislative command of Section 26-2105(b) that the act of sexual intercourse was not to be exhibited (J.A. 31) and the legislative command of Section 26-2011 as to what constituted "public indecency" and the legislative command of Section 26-2101(c) as to what constituted pandering.

applying community standards. . ." (Our emphasis) Appellant's claim that the trial court should have defined community standards as being in the nation as a whole (J.A. 45) has already been rejected by this Court in *Miller v. Calif.* 413 US 15, 37 L.Ed.2d 419, 435 93 S.Ct. 2607. In the Miller case, Chief Justice Burger, writing for the majority of the Court, cited with approval the very language used by the trial court:

> We conclude that neither the State's alleged failure to offer evidence of "national standards," nor the trial court's charge that the jury consider state community standards, were constitutional errors. Nothing in the First Amendment requires that a jury must consider hypothetical and unascertainable "national standards" when attempting to determine whether certain materials are obscene as a matter of fact. Chief Justice Warren pointedly commented in his dissent in *Jacobellis v. Ohio, supra,* 378 US, at 200, 12 L.Ed 2d 793:
>
> *"It is my belief that when the Court said in Roth that obscenity is to be defined by reference to 'community standards,' it meant community standards* - not a national standard, as is sometimes argued. I believe that there is no provable 'national standard' . . . At all events, this Court has not been able to enunciate one, and it would be unreasonable to expect local courts to divine one." (Our emphasis).

The Georgia Supreme Court has since indicated in *Slaton v. Paris Adult Theatre I,* 201 SE 2d 456 (Oct. 30, 1973), that the standard for *appellate review* under Georgia law is a state standard. The latter decision places Georgia law squarely within the protection of the Miller decision.

There is no substance in appellant's claim that the trial court in Dougherty County, Georgia must, in the first instance, instruct the jury in terms of a state standard. There is no reason to suspect that the standards of Dougherty County are any different from those in any other county in the State of Georgia or the nation as a whole. In fact, one New Jersey Appellate Court has held that it was to be presumed that the community standards were the same. See *New Jersey v.*

Hudson County News Co., 78 N.J. Super 327, 188 A2d 444 (Feb. 20, 1963), reversed on other grounds (search and seizure) in 196 A2d, 225 (Dec. 16, 1963):

> "In making those findings and reaching those conclusions we have applied contemporary standards of decency.
>
> Defendants argue that the standard to be applied is a national one since federal constitutional provisions are involved, and that error was commited at the trial because the testimony and court's charge 'regarded the community standard as that of Hudson County.'
>
> We find that the trial court did not apply an improper standard. It is to be presumed that the community standards of morality in Hudson County are the same as those in any other county in the State or Nation. A county is a recognized subdivision of a state. Unless it is demonstrated that the standards of morality in Hudson County are different from those in comparable political subdivisions, it cannot be said that improper standards were applied."

Further, Appellant, in failing to present that question in the state court proceedings below, has failed to raise a substantial federal question for this Court's jurisdiction. *Zucht v. King* 260 US 174, Supreme Court Practice, Stern and Gressman, Fourth Edition at p. 116.

D. Georgia Code Annotated Section 26-2101 as Construed and Applied by the Georgia Supreme Court does not Violate the Federal Constitution.

As heretofore stated, the trial judge instructed the jury, not on the proscription of section 26-2105, standing by itself, but on the general obscenity charge, section 26-2101(a) together with the statutory definition for "obscene matter", set forth in section 26-2101(b) *and the specific standards established in Georgia Code Section 26-2105 as such standards bore on the general obscenity charge.* The Georgia Supreme Court did likewise, in *Jenkins v. State*, 199 SE2d 183, noting, at page 184 that:

> "The accusation charges the defendant 'with the offense of distributing obscene material'."

and holding;

". . .The chapter in which Code Annotated section 26-2105 is included at its very beginning amply defines obscenity and this particular code section, which is merely a part of the chapter, must be read in accordance with the entire chapter. This Court has held that sections of the code which relate to the same subject matter shall be construed together. See *Touchton v. Echols County*, 211 Ga. 85, 87, 84 S.E.2d 81. It seems clear then that the definition of obscenity as set forth in the chapter applies to all of the code sections dealing with this same question. . ."

In construing the "conduct" statutes to be read in "pari materia" with the general obscenity statute, the Georgia Supreme Court fulfilled the requirements of this Court as stated in *Miller v. Calif. supra* (see footnote 28). Except for the recent Miller refinements, the constitutionality of the Georgia Statute has already been established. See *Gable v. Jenkins*, at footnote 29, supra.

III

JENKINS' CONVICTION DOES NOT OFFEND ANY RIGHTS GUARANTEED BY THE FEDERAL CONSTITUTION.

A. Where the State Law as Written or Authoritatively Construed Meets the Basic Requirements Established in Miller v. Calif., This Court Should Affirm the Judgment if the Subject Matter Taken as a Whole is Reasonably Found in the State Judicial Proceedings to Treat With Sex in a Fundamentally Offensive Manner (Harlan, Concurring in Jacobellis v. Ohio).

In *Miller v. Calif. et al., supra*, this Court's obscenity decisions took a sharp turn in course from the direction in which they had been proceeding. Over night, all of the hurdles which had been constructed against law enforcement were removed and the pornographers awoke on June 21, 1973, to find themselves stripped of their defenses (see "The Legal Problems as Viewed by State Government, supra, at pages

9, 10). In spite of the braking action which this Court has applied the expected positive gains have not been achieved (see Footnote 19, supra). Nor will they until one conspicuous contradiction in those decisions is corrected (see Footnote 20, supra).

What is urgently needed is the application of a gyro correction to bring this Nation's courtrooms back on course. That opportunity now presents itself – and with a minimum of confusion. Amicus submits that the course to steer, which this emergent condition requires, is in the direction of full reliance upon the rule of law expressed by Justice Harlan in his concurring opinion in *Roth-Alberts*, 354 US at 497-498, 1 L.Ed.2d 1498, 77 S.Ct. 1304 (June 24, 1957).

One of the principle questions before this Court is the matter of how this Court will conduct itself in the future, in reviewing the final results achieved by a state judicial system which has placed the new *Miller* requirements for specificity into operation. The alternatives are: (1) a resumption of the role of, what Amicus suggests is, dictatorial censorship at the hands of the judiciary (see Footnote 18),[32] or (2) a commitment to the common sense view espoused by Justice Harlan, accompanied by a return to the state judiciary of the basic power to supervise public morality which, Amicus submits, was ever the intention of the founding fathers. The stage was set for this transfer of power when, in *Miller v. Calif.*, 413 US 15, 37 L.Ed.2d 419, 431, 93 S. Ct. 2607, this Court held:

> "If a state law that regulates obscene material is thus limited, as written or construed, the First Amendment values applicable to the States through the Fourteenth Amendment are adequately protected by the ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary. See *Kois v. Wisconsin, supra*, 408 US at 232, 33 L.Ed.2d 312 (1972); *Memoirs v. Mass., supra*, 383 US at 459-460, 16 L.Ed.2d 1 (1966) (Harlan, J. dissenting); *Jacobellis v. Ohio*, 378 US 184, 204, 12 L.Ed.2d 793, 84 S.Ct.

[32] See footnote 36.

1676 (1964) (Harlan, J. dissenting); *New York Times Co. v. Sullivan*, 376 US 254, 284-285, 11 L.Ed.2d 686, 84 S.Ct. 710, 95 ALR 2d 1412 (1964); *Roth v. United States, supra*, 354 US at 497-498, 1 L.Ed.2d 1498 (1957) (Harlan, J. concurring and dissenting).

B. The Georgia Judicial System was Justified in Affirming Jenkins' Judgment of Conviction Below.

In *Kois v. Wisconsin*, 408 US 232, 33 L.Ed.2d 312 (1972), (cited with approval in *Miller v. Calif.)* this Court, in holding that the dominant theme of the poem in a newspaper did not appeal to prurient interest, noted that:

> "In this case, considering the poem's content and its placement amid a selection of poems in the interior of a newspaper, we believe that it bears some of the earmarks of an attempt at serious art. . . ."

No such defense can be made of the subject matter and the facts on record herein.

1. Jenkins' Conviction Should be Affirmed on the Grounds That the Motion Picture Film "Carnal Knowledge" was Reasonably Found to Treat Sex in a Fundamentally Offensive Manner.

This Court cannot shut its eyes to reality and to the fact that the real party in interest in this appeal is not Billy Jenkins, who perhaps couldn't care less, but AVCO Embassy Pictures Corporation, the producer, Joseph E. Levine, the executive producer, Michael Nichols, the director, and the Motion Picture Association of America Inc.[33] The issuance of

[33] The Motion Picture Ass'n. of America is well know as an association of persons within the motion picture industry, which maintains and operates a nationwide voluntary film rating program for motion picture films, produced or distributed by members of the association and their subsidiaries and others. The M.P.A.A. rating program is administered by a Code and Rating Administration and Code and Rating Appeals Board, which reviews and rates motion pictures as to their conformity with the standards of a Code of Self Regulation. "Carnal Knowledge" was submitted by its producers to the Code and Rating Administration which issued an "R" rating and required the same, and the official seal of the Motion Picture Ass'n. of America, to be imprinted upon an introductory frame of each motion picture print thereof.

of an "R" rating and its incorporation into the film print was intended by those producers and their agents to be a representation that, applying contemporary community standards, "Carnal Knowledge" was and is suitable film fare for: (1) persons 17 years of age and over, and (2) persons under 17 years of age when accompanied by parents or adult guardians. By its verdict in this case, the jury in Albany, Georgia, thought otherwise. So did a majority of the Georgia Supreme Court. To upset those judgments would lend encouragement to a disturbing development which has been taking place in the area of motion picture films.

The commercial enterprise, which the motion picture industry represents, is engaged in a life and death struggle for the entertainment dollar. What was once a proud industry, enjoying a veritable monopoly insofar as the field of public entertainment is concerned, now finds itself pushed into the background by other forms of entertainment such as TV and sports, etc. Unfortunately for the industry and public morals, the average person no longer finds it necessary to leave his home for public entertainment. As a result, the movie moguls, whose primary concern is the corporate dollar, now find it necessary to concentrate their efforts on the type of entertainment which is not yet available to the general audience on the television screen[34] – the theme with a sensationalized sex appeal. Although the promotion vehicle herein is slightly different from that employed by the typical porno producer, and certainly the camouflage is less apparent, nevertheless the effect is the same. Although the admission price to "Carnal Knowledge" and similar films can be expected to return less than that of the typical porno theater, the potential audience of 17 year olds and over more than compensates for the difference, and makes such productions a business imperative – so long as the industry can get away with it in the courtroom. Both operations amount to one and the same thing – a capitalization on the appeal to prurient interest for the sake of commercial profit.

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[34] See footnote 23.

In characterizing the dominant theme of "Carnal Knowledge" as pornographic, Amicus does not suggest that it belongs in the same general classification as "Deep Throat". On the contrary, its technical excellence and potential audience sets it into a classification which is more destructive. Nor can it be urged that technical excellence is an exculpating factor. See Justice Harlan's view of the test on appeal in *A Book Named Memoirs v. Attorney General of the Commonwealth of Mass.*, 383 US at 459-460, 16 L.Ed.2d 1 86 S.Ct. 975 (Mar. 21, 1966) (cited with approval by this Court in *Miller v. Calif.*):

> "I think it more satisfactory to acknowledge that on this record the book has been shown to have some quantum of social value, that it may at the same time be deemed offensive and salacious, and that the State's decision to weigh those elements and to ban this particular work does not exceed constitutional limits. . . ."

Even so, the technical qualifications of "Carnal Knowledge" are not all that valuable. Consider here the criticisms made by Studs Terkel in reviewing "Carnal Knowledge" for the Chicago Daily News on July 24-25, 1971, a copy of which review appears on the opposite page. Mr. Terkel writes:

> "Carnal Knowledge is a masterpiece in slick packaging. That there is nothing inside, nothing other than the *illusion* of something is of small consequence to the box office. And that's what Show Biz is all about. The tragedy lies not in this film, but in its being taken seriously as a profound comment on men and women . . . .
>
> "But in this work, the only area of making out is the bed. We know nothing of how Clown I makes out as a lawyer or Clown II as a doctor, other than that money is no problem. . . .
>
> "Of them, we know absolutely nothing; of their privates we know everything. And thus nothing. Nothing, because we know nothing of them as humans.
>
> "Were this a film about a stallion, a bull, a rooster, or a hog, it could pass as a good exhibit in Biology I; and be especially helpful as a training film in agricultural

A dissenting report on Mike Nichols' 'Carnal Knowledge'

By STUDS TERKEL

Jack Nicholson, in a scene from "Carnal Knowledge," in which he plays the role of a successful young man who is impotent with women.

And a defense of the director and his movie

By DAVID ELLIOTT

schools. But is purportedly concerned with men and women.

"That there are such men, such women, may be a fact. That there is a Playboy 'philosophy' is also a fact. That these facts express a truth is untrue. For truth about our species homo-sapiens, must concern itself with possibilities, unfilfilled, lost somewhere along the way. No such possibilities made themselves felt in this film. Thus, caricatures, rather than flesh and blood men and women appear on the magic lantern."

Even the defense to the Terkel review also appearing on the same page of the Chicago Daily News acknowledged that the audience was repeatedly assaulted by variations on the same theme:

"Clearly it's a double-headed coin. If you don't care for being repeatedly assaulted by variations on the same theme, then the film will run down rather than progressively build up. . . ."

The question before this Court *on appellate review* is whether or not "Carnal Knowledge" taken as a whole, can be said to treat sex in a fundamentally offensive manner. See *Jacobellis v. Ohio*, 378 US 184 204, 12 L.Ed.2d 793, 807, 84 S.Ct. 1676 (Harlan dissenting). Justice Harlan in his dissenting opinion phrased his test for constitutional review to be as follows (cited with approval in *Miller v. Calif.*):

"In truth the matter in the last analysis depends on how particular challenged material happens to strike the minds of jurors or judges and ultimately those of a majority of the members of this Court. . . .I would apply to the Federal Government the Roth standards as amplified in my opinion in Manuel Enterprises, supra. *As to the states, I would make the federal test one of rationality. I would not prohibit them from banning any material which, taken as a whole, has been reasonably found in state judicial proceedings to treat with sex in a fundamentally offensive manner, under rationally established criteria for judging such materials . . . ." (Our emphasis.)*

The answer to whether or not the producers and directors of "Carnal Knowledge" were capitalizing on "an appeal to the prurient interest" and whether the subject matter treated sex in a fundamentally offensive manner can only be determined by this Court after an intelligent analysis of the film's integral parts. As in the case of hard-core pornography, those answers must come from the subject film itself.

When called upon in conference to give thoughtful consideration to such analysis, as a collective body, the members of this Court are faced with a communication problem arising out of the nature of motion picture films. Because the visual and audio facts of any film move too rapidly for the mind, it is impossible after only one viewing, to focus on detail, recall film facts with accuracy and communicate one's observation to one another. Questions which this Court must ask such as: "Does the inclusion of an oral Sodomy scene have a substantial tendency to disprove or corrupt the audience at whom it is aimed when examined in the light of Pavlov's principle or the principles espoused in Pope's "Quatrain on the Monster Vice." "Why was the visual assault of an oral sodomy scene employed by the director?" "Why was it so long?"..."Could it not have been done in another way without offending the express provisions of the statute?" "Why was it not omitted in its entirety?" and "Was it offered as a foot in the door encroachment upon public morals?"; can only be inquired into and discussed intelligently when such scenes can be brought into the same clear focus for all nine judges in the conversation. Further the implications of any given scene, with the blending of observations through sight and sound, often cannot be fully understood without examination and re-examination. To overcome that difficulty and to assist the individual members of this Court in the analysis of "Carnal Knowledge" which this Court must undertake, Amicus has attached hereto as Appendix A and B, a "Continuity" and a Time-Motion Study of the film, "Carnal Knowledge".

The continuity of "Carnal Knowledge" appearing herein at Appendix A (pages A-1 thru A-84), contains an accurate reproduction of the sound portions of the film, identifying the actors, their role and what they say as the film progresses. In addition, selected visual screened depictions are captured

by a still camera. These small photographs are reproduced at the exact point in the dialogue where such images appear, creating a miniature screen effect. The story line is broken down into its integral scenes and timed from beginning to end to identify those segments in point of importance (or exaggeration) for the benefit of the Justices considering this appeal.

The Time-Motion Study of "Carnal Knowledge" appearing herein at Appendix B (pages B-1 thru B-27) is a chronological series of still photographs of the motion picture film, timed in their relative order of appearance, which, by "stopping" the movement appearing on the motion picture screen and recording the same, permits the type of conduct being portrayed thereon to be analyzed in a fair and accurate manner. Also attached to this Brief is a casette tape containing the sound track for "Carnal Knowledge" with 756 superimposed signals indicating at what point in the sound track the particular photograph used in the Continuity and Time-Motion Study taken. Reference is made hereinafter to such Continuity and to such Time-Motion Study in support of the proposition that "Carnal Knowledge" does in fact treat sex in a fundamentally offensive manner.

In view of the nature of the audience of 17 year olds and older to whom "Carnal Knowledge" was aimed, Amicus would ask the individual members of this Court whether the simulated oral sodomy and lewd fondling scenes, etc., in "Carnal Knowledge" (see, for example, pages A81 thru A84 of the Continuity and B24 - B27 of the Time-Motion Study) were not more destructive than the sodomy scene described by defense witness Lightsey as appearing in the film "Such Good Friends". It is estimated by the National Association of Theater Owners (NATO) in their Brief Amicus Curiae (at footnote 4) that approximately 17,500,000 people paid approximately $35,000,000 in box office receipts to see "Carnal Knowledge". Though NATO would urge this as a defense, Amicus views that statistic as an indictment against the film, and the damage it has done and will do to the system of values and language of sex in our society.

In the collection of writings in "The Case Against

Pornography",[35] Ian Robinson makes the following statement against pornography (which applies in full to "Carnal Knowledge") at page 172:

> Our most obvious remark - so obvious that were it not for the assumptions of the contemporary 'debate' about pornography we would not trouble to make it - is therefore that any judgment of pornography involves questions about values. For even if pornography could be caught causing events, the question whether the events are instances of depravity or corruption could not be answered by the events themselves *qua* events. What is and what is not depravity depends not on events but on a scheme of values. If we say that Brady and Hindley were depraved and corrupted, we are judging them within a set of values which makes us believe that it is wicked to take pleasure in murder. Within that set of values, but only within it, the murders are seen as proofs of depravity. What to a physiologist may be different instances of the same action may be adultery, fornication or married bliss, depending on circumstances. What counts as depraving a human being is not to be determined by measurements of any sort. *It is the central questions of value that defenders of pornography, and liberalizing sex-talk in general, tend to ignore - which is itself, we shall argue, a tendency to deprave and corrupt.* (Our emphasis).

and at page 174:

> Sex has its unpredictable significance within what we will call 'a language of sex' in the individual's life - meaning by that phrase everything that can make sex part of humanity: images, dreams, memories, ideals, moralities, pictures, words. The last item ranges from love poetry to the tones of tenderness, the names of the sex organs, and pornography.
>
> The individual recreates the value of sex from the language of sex of those around him. (Could there be a

---

[35] The Case Against Pornography, Edited by David Holbrook, published by Tom Stacey, Ltd. 28-29 Maiden Lane, London.

society which contained just one married couple?) It is also true that language in the narrower sense of verbal expression is very important part of the circumstances of sex: the language of sex spoken and written in a society expresses the commonly understood significance of sex there, and a change in the language of sex is a change in the experience and evaluation of sex in the lives of the speakers of the language.

If pornography is a threat it is not because any man reading Mr. David Storey's novel *Radcliffe* is likely to develop a taste for being orally homosexually assaulted - though he might - and not because any woman reading Mr. Adrian Mitchell's latest, *The Bodyguard*, is likely to make for the nearest bar, there to enjoy fellatio - though that might happen too - but because pornography works on, affects and changes the common language of sex, and because it tends to deprave and corrupt that language.

and at page 175:

Pornography doesn't *cause* depravity and corruption, it is depravity and corruption. In this way it is possible to see a tendency to corrupt and deprave connected with pornography not in a cause-and-effect way but as an internal relationship: the corruption occurs in whatever reading allows pornography to be itself.

and at page 176:

If this is so, the question what is and what is not pornography falls within literary criticism, and so is unlikely to be dealt with well in courts of law.

Many an honest legal penny has been earned by counsel demonstrating that a writer's intention was innocent though his work may look guilty. But having transferred the discussion to literary criticism we can say that a writer's intention is to be dealt with here in the same way as elsewhere in literary criticism. The question is again resolved into consideration of the work in our inner possession: the real intention is the one that gets expressed, and intention is the same as expression. *Unless an author is incompetent his work*

intends to say what it does say.

If, however, the definition of pornography must be left to a court of law, the important dialogues ought at least to go differently. At present the ordinary thing is for the defense to discomfit presecution witnesses by asking them whether they personally have been depraved or corrupted by the work in question. Usually a witness will refuse to admit he has been, and the case against the book is weakened. Or perhaps he will say very bravely (as Sir Basil Blackwell did) that he has been corrupted - but then the following question *how?* will still be unanswerable except in embarrassingly personal terms. Instead the dialogue should go:

Question: Has it corrupted you?

Answer: Yes.

Question: How?

Answer: Look how it works here and here. This is isn't it?

- the discussion is now to be continued of the book, not of the witness's possibly abnormal psychology: the discussion is resolved into literary criticism? and if *The Times* want to find 'disintegration' the place to look is in the pornography itself. (Similarly the general answer to the questions: 'Have you personally benefited from reading Dickens? How?' should take the form of Captain Brown's exclamation in *Cranford*, 'Don't you think it is famously good?) But this will hardly do in court, where neither criticism nor the language of sex are much at home. The questions we have to ask, though not quite the ones that are forbidden, are too much like them, 'Is the thing in front of us shocking, outrageous or offensive to decent feeling?' From the point of view of the lawyer the trouble is that really 'the thing' is not in front of us, it is within us.

Because we have to do here with a language of sex, and with corruption as part of understanding, all readers are corrupted to the degree of their reading, and non-readers are corrupted to the degree of the impact of pornography on the common language. This last is why

the matter affects everybody: *the language of sex is everyone's concern, celibates and all, because we all have to make sense of sex within it.*

and at page 178:

We can, however, on the strength of the foregoing discussion, make some general distinctions between what is and what is not pornographic.

A work whose sexual content is left deliberately uncontrolled by the artist is pornographic. Nude love-making on stage or screen is always necessarily pornographic because the expression - the understanding of the audience - cannot be controlled as part of the work. Nude love-making immediately breaks the art of the play and instead thrusts real voyeurism upon the audience. It is possible to imagine times and places where an audience would not be unartistically engaged by stage sex, but that time and place cannot be Christendom at the end of its second millennium. *We are used to modesty and privacy, and in our language of sex the response to nude love-making is not to the play but to the real (or not) actions.* We want to know how far they're really going and what they feel like doing it. And are they really doing it? (Our emphasis.)

In the above framework of values, if the State of Georgia, in crystal-clear legislative language, and crystal-clear judicial language, holds that a motion picture exhibitor may not exhibit "an act of sexual intercourse" and "a lewd fondling of the body of another person. . ." then by sovereign fiat, scene 37 and scene 6, described below, become hard-core pornography:

(a) Scene 37 (See Continuity at A-78 thru A-84 and Time-Motion Study at B-24 thru B-27) which presented a five minute scene in which a prostitute Louise performed fellatio (simulated) on Jonathan in his apartment). Of those five minutes, 2-1/2 minutes are devoted to the depiction of the felonious act of sodomy itself. (See A-80 thru A-84 and B-24 thru B-27 at Photographs 701-756.)

(b) Scene 6 (See Continuity at A-14 thru A-15 and Time-Motion Study at B-4 thru B-5) which presented a 23 second scene in which Sandy is shown placing his hand on Susan's breast, after telling Jonathan that he was going to "feel her up" and a one minute scene in which Susan herself takes Sandy's hand and places it on her breast. (See A-14 thru A-15 and B-4 thru B-5 at Photographs 67-69 and 77-96).

The following scenes also come under a like proscription:

Scene 7 (See continuity at A-15 thru A-17 and Time-Motion Study at B-4 thru B-5) wherein Sandy demonstrates to Jonathan how Susan "unzipped his fly" and "did it" (See masterbation motion at A-17 photo 109).

Scene 13 (See continuity at A-24 thru A-25 and Time-Motion Study at B-6 thru B-7) wherein Jonathan and Susan have sexual intercourse.

Scene 15 (See continuity at A-26 thru A-28 and Time-Motion Study at B-8 thru B-9) wherein Sandy and Susan engaged in sexual intercourse in Sandy's dorm room after Sandy produces a contraceptive.

Scene 25 (See continuity at A-45 thru A-47 and Time-Motion Study at B-12 thru B-13) wherein Jonathan and Bobbi engage in sexual intercourse in Jonathan's apartment.

Scene 26 (See continuity at A-47 thru A-48 and Time-Motion Study at B-14 thru B-15) wherein Bobbi joins Jonathan in shower.

See the Georgia Supreme Court's ruling on similar scenes in "I Am Curious (Yellow)" in *Evans Theater Corp. v. Slaton*, 227 Ga 377, 180 SE.2, 712, 715 (Mar. 4, 1971), cert. denied 404 US 950, 30 L.Ed.2 267, 92 S.Ct. 281 (Nov. 9, 1971). Any question as to whether, under state law, the proscription as to an "act of sexual intercourse" included simulated sexual activity was fully answered in *Slaton v. Paris Adult Theatre I*, 185 S. E. 2d 768 at 770, (November 5, 1971):

> "Appellee also contends, and the trial judge so found that the sexual activity depicted in these films is merely simulated, and that, being such, it is not obscene. This contention we unhesitatingly and utterly reject. True,

> the activity in the films here involved is not revealed in the explicit detail embodied in the films in the Walter case. But, we held in the Evans Theatre case that, "I Am Curious (Yellow)," depicted hard core pornography. In that case, only simulated sexual activity was involved. The films in this case leave little to the imagination. It is plain what they purport to depict, that is, conduct of the most salacious character. We hold that these films are also hard core pornography, and the showing of such films should have been enjoined since their exhibition is not protected by the first amendment."

Amicus submits that it is not a proper exercise of this Court's federal appellate jurisdiction, and it is no business of this Court to tell the Georgia State Government that it may not so act in relation to the above described and other scenes depicting explicit sexual conduct in "Carnal Knowledge." The values which are at stake here are "public values", not those to which Justice Marshall addressed himself in *Stanley v. Georgia*, 394 US 557, 22 L.Ed.2d. 542, 550, 89 S.Ct. 1243 (Apr. 7, 1969) when this Court held that the State of Georgia did not have the right "to control the moral content of a person's thoughts."

2. Jenkins Conviction Should Be Affirmed On The Grounds That He Has Reasonably Been Found To Be Guilty Of Conduct Which Treats Sex In A Fundamentally Offensive Manner.

Corollary to the question regarding the "obscenity vel non" of "Carnal Knowledge" is the further question which should be asked in relation to Justice Harlan's test for appellate review, stated in *Jacobellis v. Ohio*, supra, regarding Jenkins "conduct" as operator of the Broad Avenue Cinema: "Was his conduct such that it can be said the state acted reasonably in finding Jenkins guilty of operating a business which treated sex in a fundamentally offensive manner?"

The prosecutor's case in chief consisted solely of a showing of the film "Carnal Knowledge" to the jury (see page 24, (supra). As proof of knowledge, the prosecutor relied upon the nature of the subject matter and the fact

that Jenkins, as the manager and operator of the theater, knew the contents of the film. In his defense, Jenkins offered the testimony of Ed Lightsey who testified that another film entitled "Such Good Friends" was presently playing at a theater in Albany and had a scene wherein was shown one of the men "was talking over the telephone, a woman, one of the essential characters in the movie, performed an act of sodomy on him" and that after this was over, he said "Oh, God damn, I'm sorry I got it on your nose." Jenkins also gave an unsworn statement (see page 28, supra) in which he stated "as far as the motion picture 'Carnal Knowledge' is concerned, I have no knowledge of this motion picture being obscene or breaking any state or local law because of its content. . ." In rebuttal the presecutor offered the testimony of investigator Lynn Stout (see page 29, supra) who introduced nine photographs of pictures being shown on the screen of the Broad Avenue Cinema on July 14 (Ravager), July 12 (Sweet Bird of Aquarius) July 4 (Midnight Plowboy) and July 22 (Southern Comfort) and (Tobacco Roady) showing explicit sexual conduct. Lynn Stout also testified that there had been an arrest at the Martin Theater in October 1970 for a previous showing of Carnal Knowledge and that an agreement had been reached with the Martin Theater that the film would not be shown in Albany, Georgia unless there was a judicial determination. Jenkins stipulated that he had knowledge of that agreement.

Amicus submits that the state of the record noted above demonstrates that the State of Georgia was justified in affirming the judgment of conviction in that Jenkins has reasonably been found to be guilty of conduct which treats sex in a fundamentally offensive manner.

CONCLUSION

For all of the foregoing reasons, the judgment of the Georgia Supreme Court should be affirmed. The time has come for this Court to commit itself to the common sense view espoused by Justice Harlan in *Roth-Alberts*, supra, and other cases, and to return to State Governments the power to supervise public morality. Surely this nation's experience

over the past 17 years, as documented in *Miller v. California* et al, supra, has demonstrated that this Court must abandon its former practices in the administration of appeals of obscenity cases, which amounted to nothing less than arbitrary and dictatorial censorship at the hands of the federal judiciary.[36] This latter result was never intended by the founding fathers.

Respectfully submitted,

Charles H. Keating, Jr.
Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that on this day of March, 1974, copies of the within Amicus Curiae Brief were airmailed, postage prepaid, to the below listed parties to the proceedings. I further certify that all parties required to be served have been served.

Mr. Carter Goode
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Attorney for Amicus Curiae

[36] Judge Learned Hand viewed the court's usurpation of this inherent right of the people as an evil. See Hand, Bill of Rights, Harvard University Press (1958) at page 73, 74:

> "For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them which I assuredly do not. . ."

Hand gave insight to his decisions, which restricted the role played by the courts:

> "It is often hard to secure unanimity about the borders of legislative power, but that is much easier than to decide how far a particular adjustment diverges from what the judges deem tolerable. On such issues experience has over and over again shown the difficulty of securing unanimity. This is disastrous because disunity cancels the impact of monolithic solidarity on which the authority of a bench of judges so largely depends. People become aware that the answer to the controversy is uncertain even to those best qualified, and they feel free, unless especially docile, to ignore it if they are reasonably sure they will not be caught."

APPENDIX A

Continuity *(Scenario) of motion picture film "Carnal Knowledge",..... 3-84

*The "Continuity" contains an accurate reproduction of the sound portion of the film, identifying the actors, their roles and what they say as the film progresses. In addition, selected *visual* screen depictions are captured by a still camera. These small photographs are reproduced at the exact point in the dialogue where such images appear, creating a miniature screen effect. The story line is broken down into its integral scenes and timed from beginning to end to identify those segments in point of importance (or exaggeration) for the benefit of the Justices considering this appeal.

The inability of the mind to recall accurately and chronologically the rapidly moving visual and audio "facts" presented in a motion picture film point to the need for recording accurately, as much of the factual material as is possible, for use in conjunction with the principle of "past recollection recorded." As that concept has utility for purpose of oral argument. With the latter accessory, an intelligent analysis and examination of the film based on its content is possible.

CARNAL KNOWLEDGE

(Playing Time - 97 Min.)

Avco Embassy Release of a Mike Nichols Production. Directed by Mike Nichols. Executive Producer, Joseph E. Levine. Associate Producer, Clive Reed.

CAST: Jonathan - College Chum of
Sandy - Later a Doctor.
Susan - Their girl friend, later Sandy's wife.
Bobbi - Jonathan's mistress, former commercial actress.
Cindy - Sandy's mistress.
Jennifer - Sandy's hippie girl friend.
Louise - A prostitute.

SCENE I (:03)

CREDITS APPEAR AS VOICES OF JONATHAN AND SANDY ARE HEARD DISCUSSING GIRLS AND SEX. BIG BAND MUSIC OF THE '40'S IS HEARD IN BACKGROUND ("MOONLIGHT SERENADE")

Jonathan: "If you had a choice -- "

Sandy: "Yeah?"/1

Jonathan: "Would you rather love a girl or have her love you?"

Sandy: "I want it mutual."/2

Jonathan: "If you couldn't have it mutual."

Sandy: "You mean, would I rather be the one who loves,/3 or is loved?"

Jonathan: "Yes."

Sandy: "It's not that easy a question./4 I think I'd rather be in love."

Jonathan: "Me, too,/5 I wouldn't want to get hurt, though."

Sandy: "You're in love with Gloria."

Jonathan: "I was startin'/6 to be in love with her. But she let me feel her up on the first date. Turned me right off." (:44)/7

Sandy: "You kept going?"

Jonathan: "Oh, she let me feel her up."

(Laughs. They both laugh.)/8

Sandy: "Yeah, what about Gwen?"

Jonathan: "Her I can talk to."

Sandy: "I've never been able to talk to /9 any girl."

Jonathan: "I was really getting crazy about her. She's stuck-up. Wouldn't let me lay a hand on her./10 So I went back to Gloria."

Sandy: (Chuckles) "Well -- you want perfection."

Jonathan: "What do you want, wise guy?"/11

Sandy: "She just has to be nice." That's all.

Jonathan: "So -- you wouldn't want her beautiful?"

Sandy: "She doesn't have/12 to be beautiful. I would like her built, though."

Jonathan: "I want mine sexy-lookin'."

Sandy: "I wouldn't [13] want her to look like a tramp."

Jonathan: "Sexy doesn't mean she has to look like a tramp. There's a middle ground, you know."

Sandy: "I would want that, [14] yeah."

Jonathan: "Tall -- very tall. That would scare me. (Laughs.) [15] She should be very understanding -- start the same santence together."

Sandy: "Yeah, I'd like that."

Jonathan: "Big [16] tits." (Laughs.)

Sandy: "Yeah, but still a virgin."

Jonathan: "I don't care about that."

Sandy: "C'mon." [17]

Jonathan: "I wouldn't mind (2:10) if she was a little ahead of me. Those big tits. Hundreds of different ways." [18]

Sandy: "I want more of a companion. The other stuff I can get on the outside." [19]

Jonathan: "First time I do it, I want it beautiful. Not waste it on some beast." [20]

Sandy: "I feel the same way about getting laid as I feel about going to college. We're being pressured [21] into it."

SCENE II (2:50)

JONATHAN AND SANDY MEET SUSAN AT COLLEGE MIXER

(Music up. "I'm Getting Sentimental Over You."/22)

Susan is leaning against window seat. They are watching her.) /23 thru 29

Jonathan: "You like that?"/30

Sandy: "Yeah."

Jonathan: "I give her to you."

Sandy: "What's wrong with her?"

Jonathan: "I'm a generous guy, and yeah, I'm grateful."

Sandy: "How do I break the news to her?"

Jonathan: "You go over there --"

Sandy: "Yeah --"

Jonathan: "There's a way to talk to girls, you know. Tell 'em a joke."

Sandy: "What joke?"

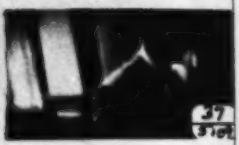
Jonathan: "Tell her about your unhappy childhood."/31

Sandy: "That's not bad."

Jonathan: "But don't make it like an act. No, go ahead -- (4:14) go ahead, schmuck. If you don't, I will."

Sandy: "You! You can't even stand / 32 up."

(Music up. Sandy approaches Susan, loses nerve and retreats.) / 33 thru 37



Jonathan: "Fucked up / 38 it's my turn (5:18) now."

Sandy: "What d'ya mean, it's your turn. She's mine. You gave her up to me."

Jonathan: "You struck out."

Sandy: "I get two more times at bat." / 39, 40, 41

(Music up. Sandy goes over, stands beside Susan, looks out window.)

Susan: "This is the first time I've ever been to a college mixer."

Sandy: "Me too, I hate them."

Susan: "I hate them too." (6:03)

Sandy: "It's such a phony way of meeting people."

Susan: "Everybody puts on an act."

Sandy: "So even if you meet somebody,/ 42 you don't know who you're meeting."

Susan: "'Cause you're meeting the act."

Sandy: "That's right. Not the person."

Susan: "I'm not sure I agree."

Sandy: "With what?"

Susan: "With what you said."

Sandy: "No I don't either."

Susan: "You don't agree with what you said?"

Sandy: "How do you feel about it?"

Susan: "I think people only like to think they're putting on an act -- but it's not an act -- it's really them. If they think it's an act, they feel better because they think they can always change it."

Sandy: "You mean they're kidding themselves because it's not really an act."

Susan: "Yes, it is an act -- but they're the act. The act is them."

Sandy: "But if it's them, then how can it be an act?"

Susan: "'Cause they're an act."

Sandy: "But they're also real."

Susan: "No, Sandy."

Sandy: "You mean I'm not real?"

Susan: "No, Sandy."

Sandy: "I'm an act --."/ 43

Susan: "Don't you behave differently with different people?"

Sandy: "No!"

Susan: "With your family?"

Sandy: "Well, sure -- with my family -- "

Susan: "And with your friends you're another way."

Sandy: "Sure --"

Susan: "And with your teachers, you're still another way -- so which one is you?"

Sandy: "Well, when you put it that way. You ought to be a lawyer."

Susan: "I'm gonna be a lawyer."

Sandy: ". . . want to be a lawyer?"

(Music)

Sandy: "You're from Smith, right?" /44 (7:32)

Susan: "Uh, huh."

Sandy: "Do you like it?"

Susan: "Yeah, I like it all right. Do you like Amherst?"

Sandy: "Sure, why shouldn't I? My parents work very hard to send me. I'd better like it. Do you have a name or something?"

Susan: "Susan."

Sandy: "I'm Sandy."

SCENE III (7:57)

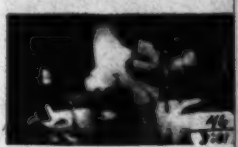
DORM ROOM AT NIGHT, SANDY AND JONATHAN DISCUSS SUSAN

Jonathan: "I think /45 you can make out with her."

Sandy: "You think so?"/46

Jonathan: "She's stuff."

Sandy: "You think so?"



Jonathan: (8:05) "I wouldn't kick her out of bed."

Sandy: "Then -- I shouldn't try somebody else then?"

Jonathan: "Who?" (They laugh.)/47

Sandy: "Well, she was the best-looking girl at the whole mixer. I'll say that for her. Wasn't she?"

Jonathan: "Her tits were too small."

Sandy: "Yeah, /48 I was thinkin' that. The hell with 'em!"

Jonathan: "But her legs were great."

Sandy: "You think so? Standing so close, I really couldn't tell about her legs."

Jonathan: "I wouldn't kick her out of bed."/49

Sandy: "She's got some funny ideas."

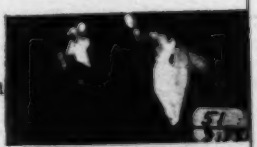
Jonathan: "I wouldn't kick /50 her out of bed."

SCENE IV (8:49)

SANDY WALKS SUSAN HOME AFTER A DATE. THEY KISS.

Susan: "Don't push me,/51 Sandy."

Sandy: "What's the matter? I like you very much, Susan./52 It's our third date."



Susan: "I like you too." (9:02)

Sandy: "Well, you let me kiss you last week."

Susan: "And this week --"

Sandy: "If I could kiss you once last week, I should be able to kiss you at least twice tonight."

Susan: "You're the only boy I know that I can talk/ 53 to."

Sandy: "I can't see you being quiet for any guy."

Susan: "No, not quiet, exactly -- but if you know somebody's not going to approve of what you are --"

Sandy: "Whatever that is --"

Susan: "Whatever that is. Well, you just don't tell him. I mean, if I like a boy, and I want him to keep liking me, and I'm brighter than he is -- I have to not show it, or I'll lose him -- so it's hard."

Sandy: "Well, I wouldn't want anyone overly bright."

Susan: "Yeah, but you wouldn't feel threatened."

Sandy: "I might be bothered/ 54 a little."

Susan: "I don't think you would nearly as much as some people. Now, for instance, some day I want to write novels. Not now, but, you know, later on, -- when I have something to say. Now that doesn't threaten you, does it?"

Sandy: "No./ 55 Maybe a little."/ 56 (10:04)

Susan: "Don't press so hard./ 57 See, it's better when it's gentle. See? / 58 What are you grinning at?"

(They are kissing.)

SCENE V (10:28)

JONATHAN URGES SANDY TO "FEEL HER UP" AND "GO ALL THE WAY" WITH SUSAN.

(Jonathan in shower is talking to Sandy who is shaving.)

Jonathan: "You 59 feel her up yet?"

Sandy: "C'mon. I like this girl. 60 I don't want (--inaudible.)

Jonathan: "Was I right about kissing her?"

Sandy: "Listen -- we had a big fight over it." (He is shaving.)

Jonathan: "And you won!"

Sandy: "Well, I don't know if I won or not."

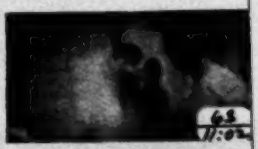
Jonathan: "Why do you let yourself be pushed around?"

Sandy: "You're the one who's pushing me around! 61 Well, I guess I won -- Sure I won. She kissed me five times."

Jonathan: "And that's when you should have put your hand on her tits." 62

Sandy: "C'mon. When this girl's nice enough to kiss me, I should do that to her?"

Jonathan: "You act as if she's doin' you a favor." 63

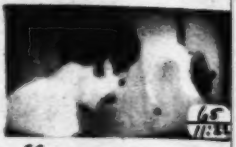


Sandy: "Well, it is sort of a favor, isn't it? I mean, when a girl lets you kiss her -- you know, 64 go on from there. Feel her up -- you know, the rest

of it -- (Jonathan is giggling) -- Go all (11:07) the way -- and the rest of it. I mean, isn't it a favor?"

(Jonathan is still giggling -- almost laughing.)

Sandy: "What's in it for her? I mean, she's not getting paid or anything."

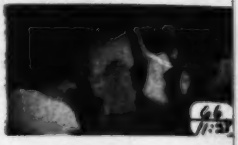


(Jonathan is laughing.)

Sandy: "Fuck you."/65

(Jonathan laughs.)

Sandy: "Okay, okay -- I'll feel her up."/66



SCENE VI (11:29)

SANDY PLACES HIS HAND ON SUSAN'S BREAST. SUSAN PLACES HER HAND IN THE AREA OF SANDY'S GENITAL ORGAN.

Susan: /67 "Sandy, please take your hand off my breast."

Sandy: "Why?"

Susan: "'Cause I want you to./68 How can it be any fun for you, if you know I don't want it?"

Sandy: "I didn't say it was fun."

Susan: "Then why is your hand where it is?"

Sandy: "Because the way we're going, by this time I should be feeling you up."/69

Susan: "Hmph! I don't feel that way about you, Sandy."/70

Sandy: "I feel that way about you."/71

(Pause) (12:01)

Susan: "You want me to feel something for you, too, don't you?"

Sandy: "I thought you liked me."

Susan: "I do like you. But I like you for other reasons.

Sandy: "So--"

Susan: "So--? If we went any further, there wouldn't be those reasons any more."

Sandy: "Well, we might/72 have something else, though."

Susan: "What?"

Sandy: "Something else. (pause) You're the first girl I've ever done that to, Susan." /73(pause)/74

Susan: "I didn't know that."

Sandy: "It doesn't show?"

Susan: "No."

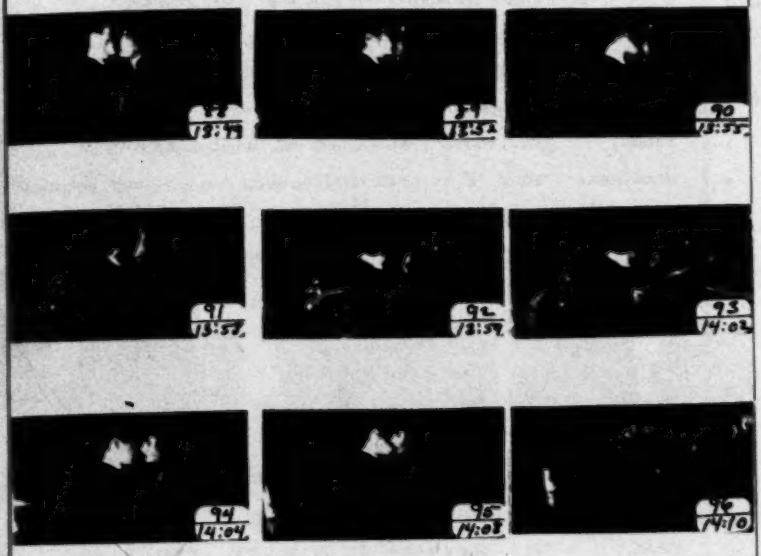
(Pause.) (13:01)

Sandy: "Well, it's something we both have to go through, I guess."

(They start kissing -- she puts his hand on her breast.)

Sandy: "Susan, are you a virgin?" / 81 thru 87 (Pause.)

Sandy (Cont'd): Well, 88 what do I do with my other hand? 89 thru 93 (Pause.) (14:01) What're you going to do with your hands?" 94-95-96



SCENE VII (14:12)

SANDY DEMONSTRATES TO JONATHAN HOW SUSAN "UNZIPPED HIS FLY" AND "DID IT."

Jonathan: (14:12) "And then what?" 97

Sandy: "She told me to take my hand off (14:14) her breast." 98

Jonathan: "What'cha do?"

Sandy: "I said I didn't want to."

Jonathan: "Then what?"

Sandy: "She said how could it be fun for me when she didn't like it." 99

Jonathan: "Jesus."

Sandy: "I thought that she liked it."

Jonathan: "Yeah --"

Sandy: "She said, 'I like you for other reasons' --"

Jonathan: "Other reasons:"

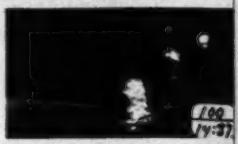
Sandy: "So I told her how I really needed this."

Jonathan: "What did you tell her?"

Sandy: "You know, that it was my first time --"

Jonathan: "Your first time what? What did you say exactly?"

Sandy: "I don't remember exactly./100 That she was the first girl I ever tried to feel up."



Jonathan: "You told her <u>that</u>?"

Sandy: "Is it a mistake?"

Jonathan: "I wouldn't."

Sandy: "Then she got /101 nicer to me"

Jonathan: "What do you mean? Nicer?"

Sandy: "She put my hand on her breast."/102

Jonathan: "You mean you put it on, she left it there."

Sandy: "No. <u>She</u> picked it up and put it on."

Jonathan: "She -- she took your hand -- like this?"/103

Sandy: "That's right. I didn't know what to think."

Jonathan: "You didn't, huh --?"

Sandy: "From just wanting to be friends, she's suddenly getting pretty aggressive."

Jonathan: "Yeah. Then what?"

Sandy: "I asked her if she was a virgin."

Jonathan: "You're kidding."

Sandy: "Was that a mistake too?/ 104 Anyhow, she is."

Jonathan: "She says. So now you got what? One hand or two hands on her tits?"

Sandy: "By this time, she's put the other hand on the other one."

Jonathan: "She put both hands on? Two hands?"

Sandy: "So I said - 'What are you going to do with your hands?'"/ 105

Jonathan: "You didn't say that!"

Sandy: "It just came out!!"

Jonathan: "Yeah? Then what?/ 106 (Giggles) Oh, let me see if I got this --"

Sandy: "She unzipped my fly."/ 107

Jonathan: (Laughing) "BULL SHIT ARTIST -- Then what?/ 108 THEN WHAT?"

Sandy: "Then she did it!"

Jonathan: "Did what?"

(Sandy makes masturbation motions,/ 109 Loud laughter from both.)

Jonathan: "Bull shit artist! She really did that?/ 110 She did that?"/ 111, 112, 113 (Giggles, laughter from both, as they go indoors.)

SCENE VIII (15:56)

JONATHAN PHONES SUSAN FOR A DATE

Jonathan: "Hello, is/114 this Susan? Well, you don't know me, I'm a friend of Sandy's -- his roommate. Yeah, Jonathan. (16:04) He told you about me? Yeah. So, uh, I'm just here at Smith for tonight. Practically on campus. I was just taking a drive, you know, and /115 I found myself practically on campus --"

SCENE IX (16:20)

JONATHAN DATES SUSAN

(Driving)/116

Jonathan: "How do you like /117 Smith?"

Susan: "What's your major?"

Jonathan: "Where'd /118 you go to high school?"

Susan: "What do you do in the summer?"/119

Jonathan: "Do you always answer a question with a question?"

Susan: "Do you always date your best friend's girl friends?"

Jonathan: "Sandy told me you were beautiful."

Susan: "He told me you were sexy. I guess he's /120 just a poor judge."

Jonathan: "I guess he meant you had personality."

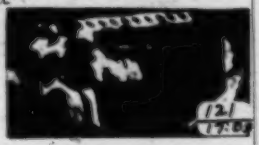
Susan: "Good grief."

Jonathan: "You have a special quality. I like girls who are special."

Susan: "Oh, hardly that special."

(Sitting in Coffee Shop)

Jonathan: "Some people / 121 you can tell about right away. Most girls I talk to it's like we're spies from foreign countries and we're speaking in code. Everything means something else. Like I say -- would you like to take a walk? -- That means something else. And she says -- I can't, I've got a French test tomorrow -- and it means something else."



Susan: "And you say, I'll come over and help you study and it means something else --"

Jonathan: "You're very sharp. I like that."

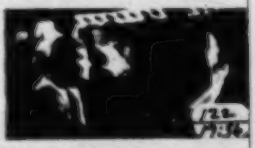
Susan: "And that means something else, too."

Jonathan: "You're TOO sharp."

Susan: "Does that bother you?"

Jonathan: "It interests me."

Susan: "Is that more code?" / 122



Jonathan: "We'd be good together."

Susan: I'm dating your best friend.

Jonathan: He won't mind."

Susan: "How do you know?"

Jonathan: "I won't tell him." (Giggles)

Susan: "What if I mind?"

Jonathan: "You want to go out Friday?" / 123

Susan: "I'm seeing Sandy."

Jonathan: "Saturday --"

Susan: "I have a date."/124

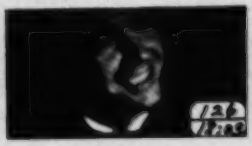
Jonathan: "Sunday --"

Susan: "I'm seeing /125 my folks."

Jonathan: "Where /126 do they live?"

Susan: "New York."

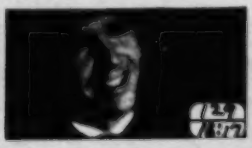
Jonathan: "Sunday night?"/127 (18:05)



Susan: "I'll be too tired."

Jonathan: "I'll help/128 you get over your folks. How about it, Susan?/129 What're you so afraid of?"/130

Susan: "Not you, Hmmm."



SCENE X (18:)

DORM ROOM AT NIGHT - SANDY DISCUSSES SUSAN WITH JONATHAN

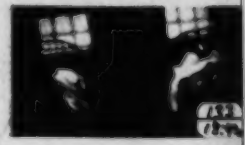
Sandy: /131 "I think I'm in love."/132

Jonathan: "Oh?"

Sandy: "I think I'm in love."

Jonathan: "Bull shit artist."

Sandy: "I really /133 think so."



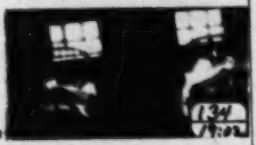
Jonathan: "Did you get in yet?"

Sandy: "What's that got to do with it?"

Jonathan: "How do you know if you don't know how you are in bed together?"

Sandy: "But that's not everything!"

Jonathan: "It's a lot."



Sandy: "She tells me thoughts I didn't even kow I had, until she 134 tells 'em to me. It's unbelievable. I can talk to her."

Jonathan: "You can talk to me, too. Are you in love with me?"

Sandy: "I can say things to her (19:05) I wouldn't dare say 135 to you."

Jonathan: "What for instance?"

Sandy: "Things you'd laugh at."

Jonathan: (Laughing) "Humph! I'm laughin' now." 136 (Laughs)

Sandy: "She thinks I'm sensitive."

Jonathan: "Sensitive? (Laughs) Sensitive! Oooh! Boy! (Laughs) What you talk to her about -- flowers?"

Sandy: "Books."

Jonathan: "Books? You phoney. I read more books than you do." 137

Sandy: "Yeah, well I'm gonna start, I'm reading 'The Fountainhead.'"

Jonathan: "'The Fountainhead'? What's that?"

Sandy: "It's her favorite book. You ever hear of 'Jean Christophe'?"

Jonathan: "What's that?"

Sandy: "It's a classic, you moron. I'm gonna read it right after 'The Fountainhead'."

Jonathan: "Yeah? Ever read 'Guadalcanal Diary' by Richard Tregaskis?"

Sandy: "No."

Jonathan: "That was a best seller and I read it. Ever read 'Gentleman's Agreement' by Laura Z. (20:05) Hobson? Ever read 138 'A Bell for Adano' by John Hersey?"

Sandy: "I'm gonna read everything from now on."

Jonathan: "I read more than you do -- so who's the one who's 139 sensitive? You or me? C'mon who's sensitive?

SCENE XI (20:21)

JONATHAN AND SUSAN ON DATE

Jonathan: "I've had a very messed up childhood."

Susan: "What does you father do?"

Jonathan: "Fails. It's not funny."

Susan: "I'm sorry. Were you very poor?" 140

Jonathan: "My father couldn't hold onto a job. He kept giving me advice. The more he failed, the more advice I got. He's a Communist, my father."

Susan: "We're Republicans. (Pause) Sometimes I think I'm a Communist, though."

Jonathan: "Me, too. We have so much -- and other people have, you know -- so little? After I get set up as a lawyer, what I'd really like to do is go into politics. Public service. What really gets me is I was too young to fight in the war, because -- what was that all

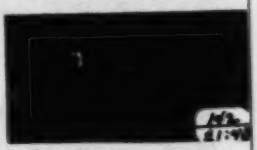
about except to prove -- everybody pitches in -- plain people have a chance. So -- even though I'm the first of my family to get an education, I don't ever want to forget where I came from."/141

Susan: "You're a lot more serious than I thought."

Jonathan: "I know."

SCENE XII (21:36)

DORM ROOM AT NIGHT -- JONATHAN TELLS SANDY OF "MYRTLE" (SUSAN)



Sandy: "Where'd you meet her?"/142

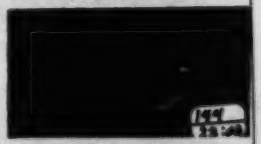
Jonathan: "I'm another person with her. You wouldn't recognize me -- the things that come out of my mouth!"

Sandy: "Boy, she really sounds like something! Is she built?"

Jonathan: "She's, uh, she's got a quality. She doesn't talk much -- but the things she says are so sharp."

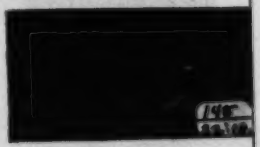
Sandy: "We should double/143-date sometime."

Jonathan: "Huh? I want to know/144 her a little better, you know. Before we double-date." (22:01)



Sandy: "Gee, isn't it great? A month ago, neither of us even knew a girl /145 -- what's her name?"

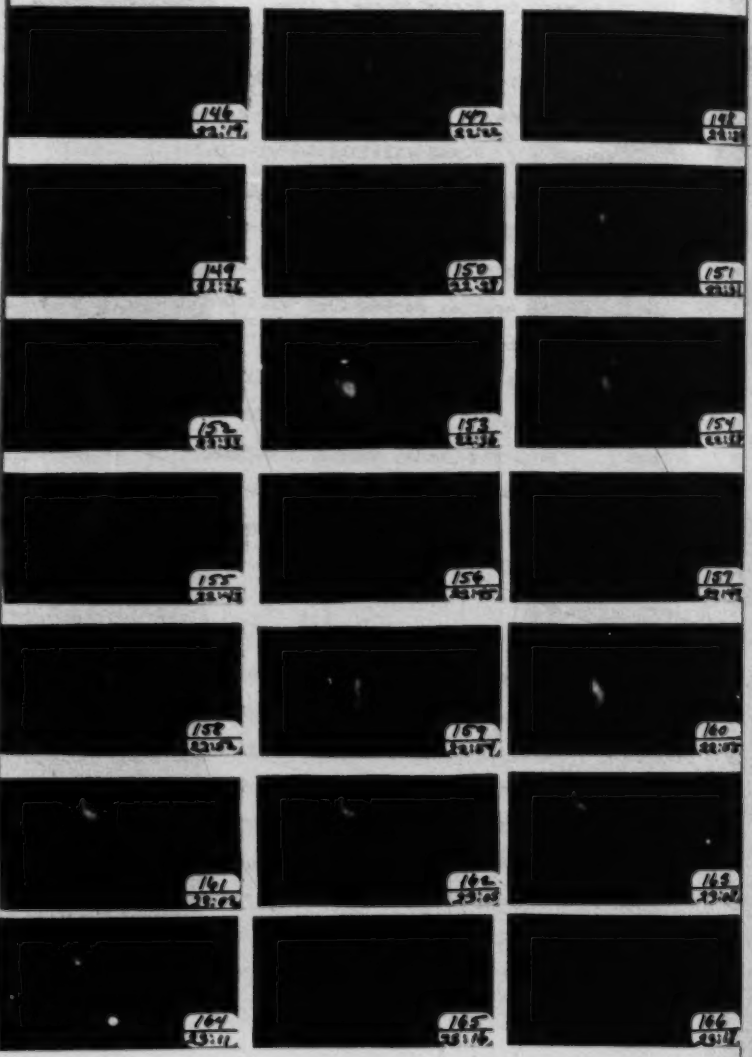
Jonathan: "Myrtle."

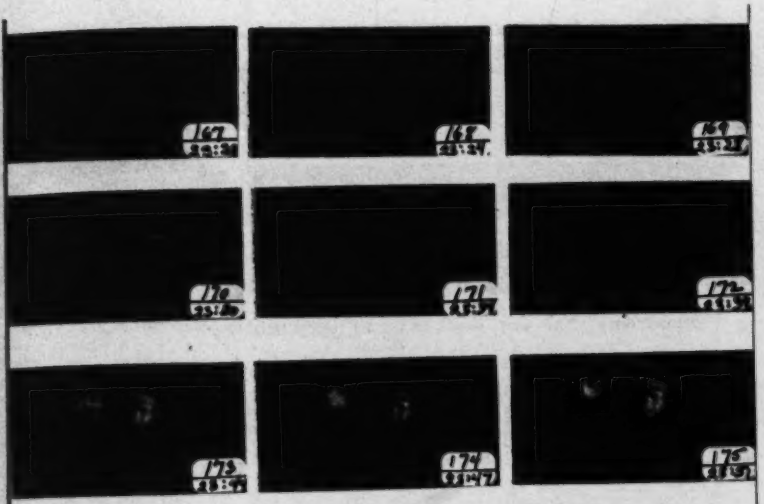


SCENE XIII (22:14)

JONATHAN AND SUSAN HAVE SEXUAL INTERCOURSE ON GRASS

(No dialogue. Heavy panting, breathing, throughout sexual activity.)





SCENE XIV (23:52)

JONATHAN TELLS SANDY HE "GOT LAID". SANDY DECIDES IT'S HIS TURN

(Sudden wild screaming, shouting.)

Sandy: (23:53) "BULL / SHIT ARTIST!" /

(Jonathan jumps into swimming pool. He is fully clothed.) /

Sandy: "You're not kiddin' me!"

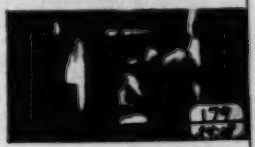
(Shouts and screams -- laughter)

Jonathan: "Look at me! You really thought --" (shouts, laughter)

(By the lockers)

Sandy: / "Next it's (24:06) my turn."

Jonathan: "I don't think she'll do it, Sandy."



Sandy: "She will -- I've just been takin' it /180 easy on her."

Jonathan: "Sandy, believe me, find somebody else."

Sandy: "Are you crazy? When I'm right on the verge? I see her tomorrow night."

Jonathan: "Uh, Sandy?"/181

Sandy: "Yeah --"

Jonathan: "Do you ever talk to her about me?"/182

Sandy: "Yeah, sure, sometimes."

Jonathan: "Do me a favor, /183 will ya?"

Sandy: "What?"

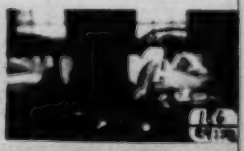
Jonathan: "Don't tell her I got laid."

SCENE XV (24:37)

SANDY'S DORM ROOM AT NIGHT. SANDY AND SUSAN ENGAGE IN SEXUAL INTERCOURSE AFTER SANDY PRODUCES A CONTRACEPTIVE.

Sandy: /184 "Please Susan. . "

Susan: "Sometimes I want /185 to do it and a second later I don't want to do it."



Sandy: "Let's do it."/186,187

-A-27-

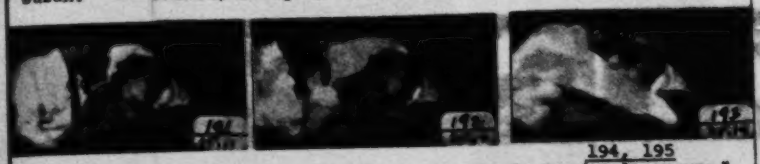
Susan: (Sighs) "I don't know why you put up with me./ 188 (Pause) I don't think I can do it."/ 189

Sandy: "That really hurts, Susan."

Susan: "Let me/ 190 --" (She reaches for him.)

Sandy: "Not any more."/ 191

Susan: "Please, Sandy."/ 192, 193

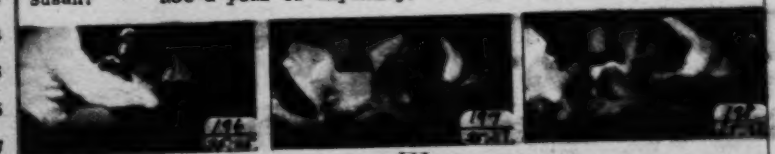


Sandy: "Oh, come on -- oh, Susan, let's do it./ 194, 195 I love you."

Susan: "Do you have anything?"/ 196, 197 (He takes out rubber contraceptive.) "How long have you had that?"/ 198

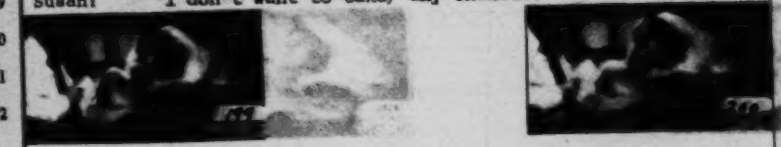
Sandy: "Not too long."

Susan: "Not a year or anything!"



Sandy: "I'm sure it's okay."/ 199

Susan: "I don't want to take/ 200 any chances."

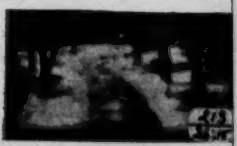


Sandy: "These things have to be okay./ (Pause) It's okay.

201 thru 206

(Pause) I'm positive it's okay."/ (Pause) (26:02)

207 thru 213



SCENE XVI (26:15)

SANDY TELLS JONATHAN HE "GOT LAID" BY SUSAN.

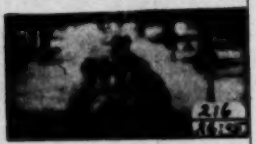
THEY ARGUE.

Jonathan: "I guess you're the first guy in history who ever got laid."

Sandy: "I'm the first guy in MY history who ever got laid."

Jonathan: "I like it, too, but you don't/214 hear me crowing about it. There's such a thing as good taste, you know."

Sandy: "What's the matter with you? Jesus. After you started scoring what did I get outta you?/215 We did it standing, sitting, in the car, under the car -- Myrtle, Myrtle, Myrtle!/216



You know, maybe you forget, but I knew Susan before you knew Myrtle -- and who scored first? You! That didn't make me feel very good, you know. In fact, it made me feel very jealous./217 But did I try to shut you up? Did I say I'm tired of hearing about it already? I didn't say it, 'cause I'm your friend, so I sat through it."

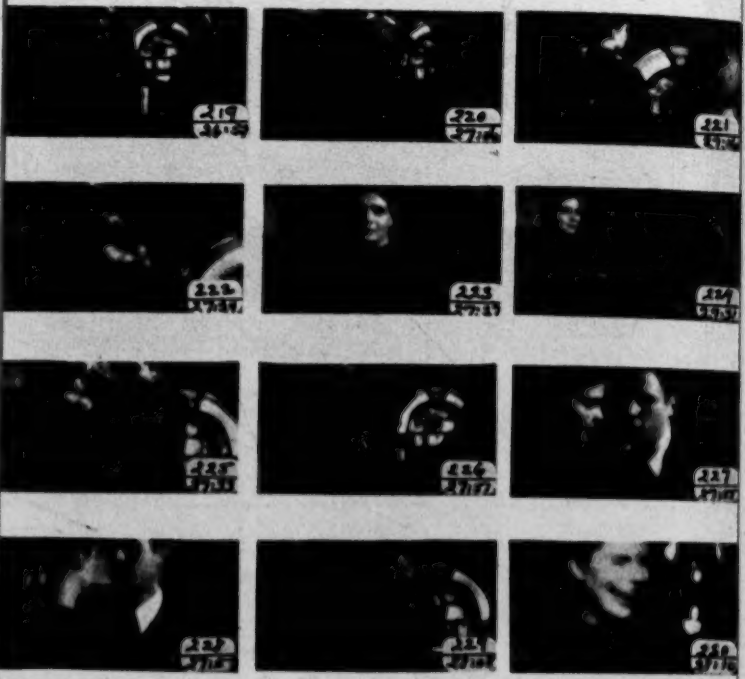
Jonathan: "Okay, okay -- Jesus, you made your point."

Sandy: "Sometimes /218 I think I'm a better friend to you than you are to me."

SCENE XVI (26:56)

DANCE - JONATHAN AND SANDY "DATE" SUSAN

(Music. "String of Pearls"./219 thru 230 Dancing. Conversation begins, much laughter, shrieking. Entire scene played with focus on Susan's face only --) (Wild laughter)



Jonathan: "Didn't you ever 231 / do that?"

Sandy: "Of course, I did. I knew what the word 'misled' meant -- I used to know -- when I first heard that I thought it was 'mizled' -- had been 'mixled'. (More wild laughing, shrieking) I kept wondering -- what did this word 232 / mean - 'mixled'."

Jonathan: "Has anybody ever heard of Round John Virgin?" (Much laughter.

Sandy: "What did you say -- Round John --?"

Jonathan: "Round John Virgin[233] . . ."

Sandy: "Is that in Falstaff?"

Susan: "Round John Virgin, Mother and Child:"[234] (Laughing)

Jonathan: "Yeah -- Round John Virgin Mother?"

Susan: (Singing) "Holy Infant, so tender and mild."[235]

Man: "All (29:01) right -- gun shee."

Man: "Gunshee? G-U-N-S-H-Y, gunshee!"

Man: "Gun-shy. I always thought[236] it was gunshee." (Laughter)

Sandy: "Susan, do you know the one about the bear -- you'll love this, Jon."

Jonathan: "Huh?"

Susan: "Oh, yeah -- the hymn we used to sing in church -- about the bear with the crossed eyes?"

Jonathan: "What are you giving me?"

Susan: "Whose name was Gladly?"

Jonathan: "Gladly?[237] The Bear?"

Susan: "Don't you know it? Gladly the "Cross I'd" bear?"

Sandy: "Gladly the cross-eyed bear -- get it?"

Jonathan: "Gladly the cross-eyed bear. Oh! Gladly the cross I'd bear!" (Laughter)

Jonathan: "All right. Pronounce this. C-H-O P-H-O U-S-E."

Susan: "Shoofus."

Sandy: "Showfus."

Jonathan: "Showfus![238] (Laughter). CHOPHOUSE!" (Wild shrieking).

SCENE XVIII (29:48)

JONATHAN AND SUSAN TALK

Jonathan: 239 "This has to stop."

Susan: "I don't know how to tell him."

Jonathan: "You don't have any trouble telling him a lot of other things."

Susan: "What does that mean?"

Jonathan: "The way you talk to him. I don't ever hear you talking to me that way."

Susan: "What way?"

Jonathan: "You know -- "

Susan: "He's very vulnerable -- I don't want to hurt him."

Jonathan: 240 "You're hurting me."

Susan: "He loves me."

Jonathan: "That's no reason to go to bed with him. (Pause) You would have just gone on, wouldn't you, if he hadn't told me?"

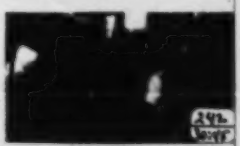
Susan: "I don't know."

Jonathan: "I would have never known a thing about it."

Susan: "I don't know -- maybe." 241

Jonathan: "Boy, you're really something."

Susan: "I don't feel like something. I feel like nothing." 242



Jonathan: "How much longer do you expect me to take this?"

Susan: "I'm trying to tell him."

Jonathan: "I see how you're trying."

Susan: "It's not my fault. I don't enjoy these fights."

Jonathan: "Listen, it's me you're supposed to be in love with.

(Pause) I'm gonna tell him."

Susan: "What?"

Jonathan: "I'm gonna tell him -- about you and me --"

Susan: "No, Jonathan!"

Jonathan: "Why don't you give me some of the understanding/ 243 that you give to him?"

Susan: "You're stronger."

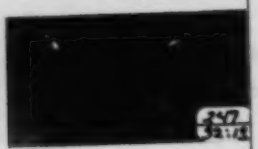
Jonathan: "You tell him everything else -- you can tell him about us."

Susan: "What do you mean I fell him everything? Who says so?"

Jonathan: "He tells me! He's my best friend./ 244 (Pause) Are you going to tell him?"

Susan: "He's so helpless." (Pause)/ 245

Jonathan: "Susan, I love you./ 246 Why can't you be more with me like you are with Sandy?" (Pause)/ 247



SCENE XIX (32:13)

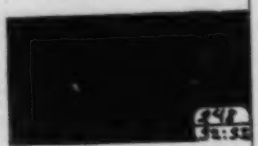
DORM ROOM AT NIGHT, SANDY TELLS JONATHAN OF HIS PROGRESS WITH SUSAN

Sandy: (32:13) (Wry laugh) "She says she's no good for me."

Jonathan: "Maybe she's trying to let you down easy."

(Sandy laughs)

Jonathan: "Go ahead and laugh. It adds up. (Laughter) Go ahead and laugh."/ 248



SCENE XX (32:35)

JONATHAN WARNS SUSAN TO TELL SANDY OF THEIR RELATIONSHIP

Jonathan: /249 "You know every mood of mine like you know/250 every mood of his --?"

Susan: "No."

Jonathan: "How come?"

Susan: "I don't know"

Jonathan: "You don't tell me thoughts I never knew I had."

Susan: "Did he say I do that?"

Jonathan: "Yes."

Susan: "When did you find out?"

Jonathan: "You do it all right,/251 so do it with me."

Susan: "I can't."

Jonathan: "You can do it with him, you can do it with me. Now -- tell me my thoughts."

Susan: "I can't!"

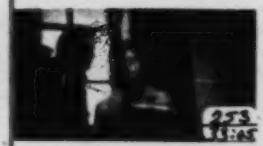
Jonathan: "Why can't you?"/252

Susan: (Whispers) "I can't with you."

Jonathan: "This has gone far enough."

Susan: "I cannot stand any more ultimatums."

Jonathan: "This is my last one. Now tonight you tell him about us, or tomorrow, I tell him./253 Look at me, Susan./254 NOW TELL ME MY GOD DAMNED THOUGHTS!"/255



SCENE XXI (33:14)

JONATHAN PHONES SUSAN. THEY ARGUE AND PART COMPANY

(Susan walks slowly down the hall to answer the phone.) 256

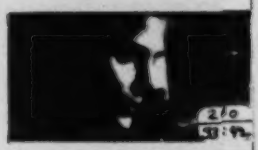
Susan: "Hello?" 257, 258

Jonathan: "You didn't do it, did you?"

Susan: "No." 259

Jonathan: "Why not?"

Susan: "He looks at me with such trust --" 260



Jonathan: "How do I look at you?"

Susan: "With bitterness."

Jonathan: "It used to be trust. At least you know my thoughts."

Susan: "Did you tell him?" 261

Jonathan: "What do you think?"

Susan: "No."

Jonathan: "So what do we do now?" 262

Susan: (Clear throat) "I don't know. I guess we get an ultimatum."

Jonathan: "Do you think there's any sense in this?"

(Pause)

Susan: "In what?"

Jonathan: "In you and me." 263

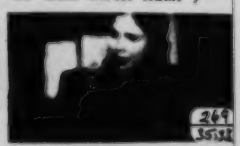
Susan: That's up to you."

Jonathan: "No, it's up to you. I don't see any point in it. I wish I were wrong./264 I don't feel anything any more."

(Pause.)

Susan: "Neither do I."/265, 266 (35:08)

Jonathan: "The reason/267 I didn't say anything to Sandy -- I knew he wouldn't believe me./268 And I'd go into detail so he would have to believe me -- and I knew he'd come running to you and I knew you'd tell him everything I said was true and I knew then you'd go to bed with him."/269



Susan: "Uh, yeah -- That's about like what would happen." (She is trying not to cry.)/270

Jonathan: (Sighs) "So."

Susan: (Crying) "So?/271 Jonathan -- I'll always be your friend."/272, 273

(She tries to laugh.)

Jonathan: (36:09) "Jesus, Susan, I hope not."/274

(She sobs. Phone hangs up.)/275

SCENE XXII (36:22)

SANDY AND SUSAN PACK FOR TRIP TOGETHER - JONATHAN WATCHES

(Focus on Jonathan's face only. Just sitting there, as Sandy and Susan talk.)

Sandy: "It's going to be buggy/276."

Susan: "How can it be buggy?"

Sandy: "It's the tropics --"

Susan: "What do you mean?"

Sandy: "The jungle!"

Susan: "Here -- cover yourself from head to toe."

Sandy: "Well, I'll get eaten alive."

Susan: "You don't know what it's like. You've never camped out before. Isn't it being silly, Jonathan?"

Sandy: "I am not."

Susan: "Are too."

Sandy: "Am not."

Susan: "Are, too. You're a real city boy."

Sandy: "How about a cot?"

Susan: "Come on, sweetie, we've got a sleeping bag."

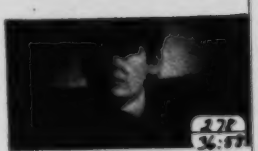
Sandy: "Are you really serious about sleeping on the ground?"

Susan: "You are a baby."/277

Sandy: "Christ -- that knapsack!"

Susan: "I told you you're overpacked. What in the world are you going to do with a pillow case?"

Sandy: "Put it back."



Susan: "Well, you are a nut. Isn't he a nut, Jonathan?"/278

Sandy: "You packed your things, let me pack mine."

Susan: "I'm just trying to help."

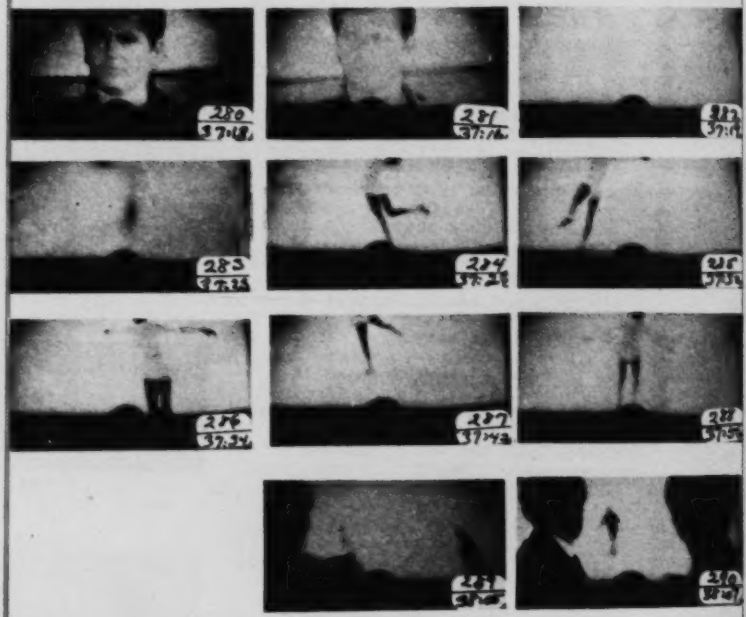
Sandy: "Well, help your own self. You have packing to do."

Susan: (Voice fading out) "You didn't leave enough room -- we're going in the woods with all this stuff --" 279

SCENE XXIII (37:19)

TIME JUMPS AHEAD ABOUT A DECADE TO THE LATE '50'S - JONATHAN AND SANDY MEET AT OUTDOOR SKATING RINK -- THEY DISCUSS PAST SEXUAL EXPERIENCES

(Organ music - at outdoor skating rink. They are watching a girl skater.) 280 thru 290



Jonathan: (38:06) "Jesus -- Do you want her?"

Sandy: "I wouldn't kick her out of bed."

Jonathan: "Would you look/ 291 at the pair on her?"

Sandy: "Get a look at that schmuck trying to keep up with her."

Jonathan: "They're always with guys like that."

Sandy: "That guy must be sixty if he's a day."

Jonathan: "Maybe he'll have a heart attack. You could save his life. Get his number and fuck her."/ 292

Sandy: (Laughs) "You bastard. You bastard."

Jonathan: "How's Susan?"/ 293

Sandy: "Couldn't be better."

Jonathan: "I always said it, and I say it now. You found yourself a jewel."

Sandy: "She is a jewel."/ 294

Jonathan: "Not bad,/ 295 that one."

Sandy: "Listen, you must be getting more than your share."

Jonathan: "I'd get married in a minute if I could find the right girl."

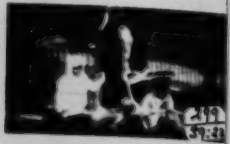
Sandy: "Bull shit artist -- you and your actress friends."/ 296

Jonathan: "Are you kidding, doctor? You're the one that's got the deal. I mean, what can I say? Take your clothes off, baby, I want to check your capital gains?"

Sandy: "I just look."

Jonathan: "Sure you do."

Sandy: "I really do./[297] Susan is plenty enough woman for one man. Hey -- look at that --"/[298, 299]



Jonathan: "That's Sally Joyce."

Sandy: "Didn't I see her on Ed Sullivan?

Jonathan: "I fucked her/[300] once."

Sandy: "Bull shit artist."

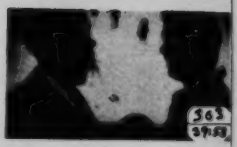
Jonathan: "I used to do her taxes. She's with/[301] another firm now."

Sandy: "Why don't you say hello?"

Jonathan: "She wouldn't remember me. She's a real ball-buster,/[302] that one. I've been through the mill with her kind."

Sandy: "Yeah."

Jonathan: "You think a girl goes for you, and you find out she's after your money or your balls. Or your money/[303] AND your balls. Women today are better hung than the men." (40:05)



Sandy: "I should have your problems."/[304]

Jonathan: "It's not/[305] as easy getting laid as it used to be. I don't think I fuck more than a dozen new girls/[306] a year now. Maybe I'm too much of a perfectionist. This last

one came so close to being what I wanted -- good pair of tits on her, not a great pair -- Almost no ass/307 at all, and that bothered me. Sensational legs. I would've settled for the legs if she had just two more inches here and three/308 more here. Anyhow -- that took two years outta my life."

Sandy: "You don't/309 want a family?"

Jonathan: "I don't wanta put it down -- but who needs it?"

Sandy: "You can't make fucking your life's/310 work."

Jonathan: "Don't/311 tell me what I can and can't do. You're so well off?"/312, 313, 314, 315

(Organ music. Then (41:20) switch to Sandy talking -- Jonathan's apartment.)

Sandy: "/316 Susan's a very good homemaker. Very efficient. I come home, everything's in its place, Which I like, because it's tiring putting in a full day at the office, then Doctors' Hospital for a couple of hours. So it's

"nice that everything's in its place when I get home. A Martini, dinner, 317 the kids -- We don't watch much television. We like to read aloud to each other. We used to have more friends than we do, but we don't have that many any more. 318 So--on weekends we might entertain a little or go over to see a friend -- come into town, see a play or a good film -- it's not glamourous or anything. 319 320 There are other things besides glamour."

SCENE XXIV (42:30)

JONATHAN AND BOBBI ON A DATE

(Music - Waltz from "Der Rosenkavalier.") 321

Bobbi: "You have a long life line." 322

Jonathan: "I like that. The way you run your nail across my, uh --"

Bobbi: "Uh -- difficult to get along with."

Jonathan: "Me?"

Bobbi: "Umm, hmmm."

Jonathan: "Bobbi . . ."

Bobbi: "Do you always know your own mind?" 323

Jonathan: "Right this minute, anyway." (Laughs)

Bobbi: "Do you always (--inaudible--) going after what you want until you get it?"

Jonathan: "Let me see your hand." 324

Bobbi: "Well?"

Jonathan: "You are built."

Bobbi: "Do you see that in my hand?" 325

Jonathan: "Even your hand is built."

Bobbi: (Laughs softly) "I think you're a dirty old man."

Jonathan: "I'm a dirty young man. How old are you?"

Bobbi: "How old do you think I am?" 326

Jonathan: "Nineteen."

(They both laugh.)

Jonathan: "Twenty."

Bobbi: "No." (Loud laughter.)

Jonathan: "Twenty-one? Twenty-two? Twenty-four?"

Bobbi: "You skipped twenty-three."

Jonathan: "Twenty-three?"

Bobbi: "No--" (They laugh)

Jonathan: "Twenty-four?"

Bobbi: "No!"

Jonathan: "Twenty-five? Twenty-six?"

Bobbi: "Nope."

Jonathan: "Twenty-seven? Twenty-eight?"

Bobbi: "No-o-o-o--"

Jonathan: "Twenty-nine? I like going out 327 with older women."

(Laughter)

(Riding in taxi) 328

Bobbi: "Are you married?" 329

Jonathan: "Are you kidding?"

Bobbi: "You don't wanna get married?"

Jonathan: "I'd marry you any time -- if -- can you cook?"

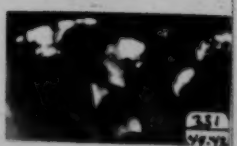
Bobbi: "Spaghetti!" 330

Jonathan: "I can cook spaghetti."

Bobbi: "Good! You do the cooking."

Jonathan: "What will you do?"

Bobbi: "What would you like me to do?" 331



Jonathan: "What would you like to do?"

Bobbi: "I asked you first."

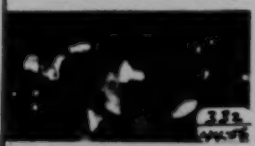
Jonathan: "Well, I'm not gonna answer you first."

Bobbi: "No? Sew!"

Jonathan: "It doesn't sound like much of a marriage. 332 Me cooking spaghetti and you sewing."

Bobbi: "Do you want a divorce? I'll take you for every cent you've got."

Jonathan: "I didn't know I was marrying a golddigger. 333 (45:08) (She laughs.) You won't take pity on me?"



Bobbi: "Only if you say you're sorry."

Jonathan: "I'm sorry --"

Bobbi: "And you'll never do it again."/ 334

Jonathan: "I'll never do it again."

Bobbi: "And you'll always be a good boy."

Jonathan: "Yes, mama."

Bobbi: "Would you like to be mothered?"

Jonathan: "I'd like to be smothered by you."/ 335

Bobbi: "What else would you like me to do to you?" (Pause)

SCENE XXV (45:40)

BOBBI AND JONATHAN GO TO HIS APARTMENT -- THEY ENGAGE IN SEXUAL INTERCOURSE

336, 337, 338, 339

(Footsteps)

Jonathan: "Well, how do you like it?"

Bobbi: "How do I like what?"

Jonathan: "Why, uh, you know --"

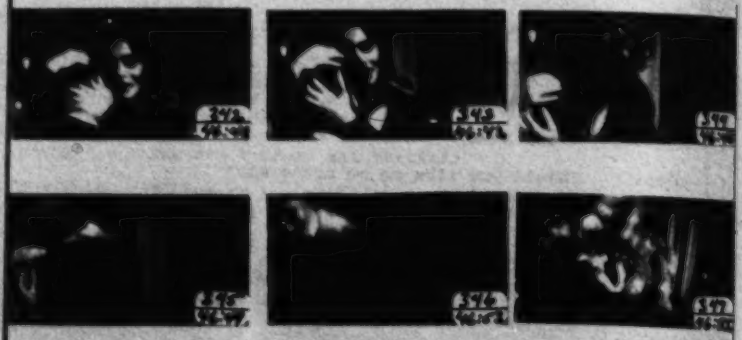
Bobbi: "What do I know?"/ 340

Jonathan: "You know everything."

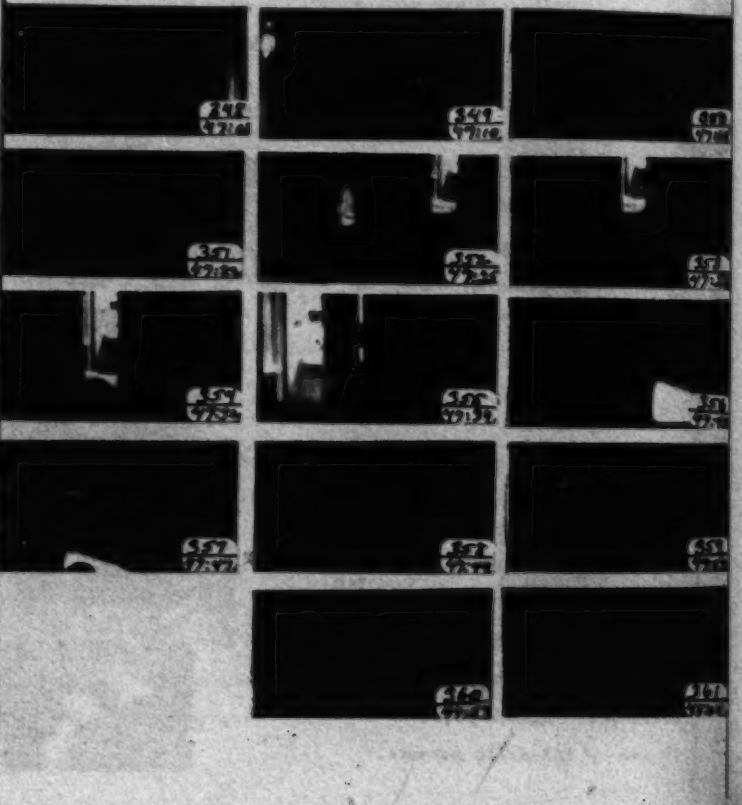
Bobbi: "I know you?"/ 341

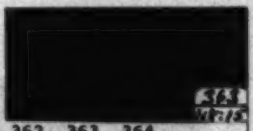
Jonathan: "I know you."

(Pause -- inaudible murmers.)



(47:00) (Record is playing -- Frank Sinatra singing "Dream".)
348
(Long interlude, loud sexual noises, moans, grunts, orgiastic sounds.)
349 thru 361





Jonathan: "Well. I almost came that time."/ 362, 363, 364

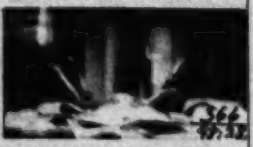
(She bursts out laughing. He laughs, too.)

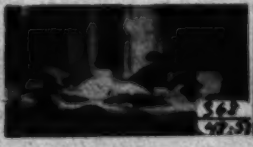
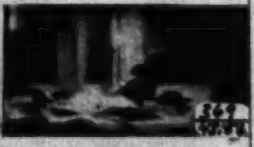
SCENE XXVI (48:2/)

JONATHAN IN SHOWER INVITES BOBBI TO JOIN HIM. SHE DOES.

(Baroque organ music.) / 365

Jonathan: (Calling from shower) "Help!"/ 366, 367, 368 (moaning sound -- inaudible words --) "Oh, nurse!"/ 369

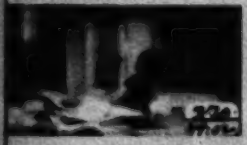


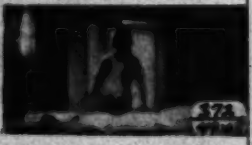



Bobbi: "What is it, Mr. Wifendorf?"

Jonathan: "Will you come in here a minute, please?"

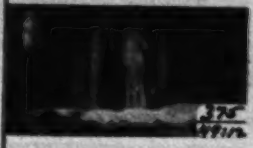
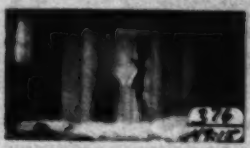
Bobbi: "Certainly, Mr. Wifendorf."/ 370 thru 374





(Bobbi, completely nude, walks to shower and opens door.)

Bobbi: "Why, Mr. Wifendorf!!!"/375, 376, 377

SCENE XXVII (49:25)

JONATHAN'S BEDROOM. BOBBI ASKS JONATHAN TO "SHACK UP" WITH HER

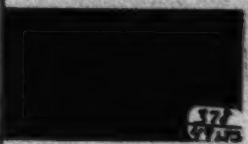
Bobbi: /378 (Sexual sighs) "All us cunts adore pricks. At every moment they want up --"

Jonathan: "I'll be happy to tell you./379 They want the boodle -- (she giggles) but they ain't gonna get the boodle."

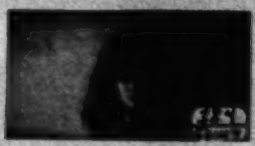
Bobbi: "Got 'em dead to rights."

Jonathan: "Because this kid here's got the boodle."

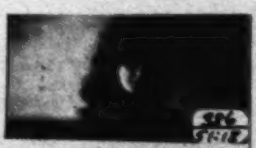
Bobbi: "Pretty sure of yourself, aren't you?"/380 (Sighs) "You're a nice man."



Jonathan: "And you're a very lucky girl."/381 thru 385



(Noise of door shutting.)

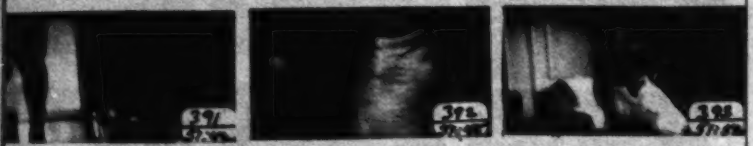


Bobbi: "You know something, Jon?"/386

Jonathan: "What is it, sweetheart?"

Bobbi: "Do you think it would be a/387 fatal mistake in our lives if we shacked up?"/388, 389, 390

Jonathan: "It's very difficult, Bobbi -- in the last couple of weeks,/391 we get along so well together./392 The idea/393 --

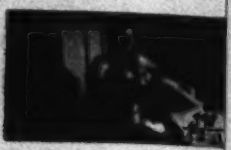


I like you very much. (52:02) So much -- this idea -- to be perfectly honest, I mean -- it sounds very good to me./394 Let's both give it a couple of days to think about it. It sounds like -- um, very good./395 Very, very, uh -- well, good. Only our eyes should be open. We should go into this -- we should know exactly what we're getting into."

Bobbi: "It's just a shack-up./[396] I'm not asking for your hand in marriage."

Jonathan: "Yes? Well, as long as we both understand that.[397]"

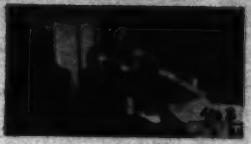
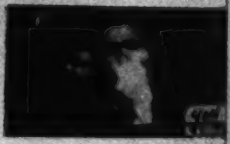
Bobbi: "We do."/[398]



Jonathan: "I just thought it's better to get it all out on the table. So later there will be no possibility of misunderstanding. I don't/[399] know how many business deals I've seen come to grief --/[400]."

Bobbi: "Okay -- you're a real prick, you know that?"/[401, 402]

Jonathan: "--Prick--"/[403, 404]

SCENE XXVIII (53:44)

RESTAURANT - JONATHAN AND SANDY REMINISCE

Jonathan: "I could very easily get serious about this girl. She's a lot of fun to be with./[405] This is just between the two of us, but -- for the last year or so, I've, I've been having -- I don't know -- a little trouble. I wasn't worried, but, still and all, a little trouble. Well, myself, y'know,

-- getting hard. It took a long time. You know how girls are today, they judge you. They judge you very quickly./406 So -- I had a real rough time, a couple of times. Very nasty innuendos./407 Like I say -- I wasn't too worried, but -- I won't lie to you. I was a little worried. Then along comes this Bobbi. I get one look at the size of the pair on her, and I never had a doubt I'd ever be anything but okay again./408 And I was...I was.

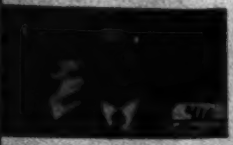
Well, with all our kidding back and forth on our first night together, I don't mind tell-
ing you I had tears in my eyes."

Sandy: "She's/409 really the girl in the girl in the airline commercial? You lucky son of a bitch."

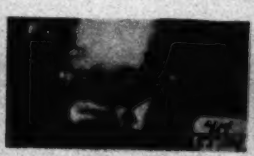
Jonathan: "I don't know./410 I don't wanta get in over my head. I got in over my head three - four times already. And, uh -- you have to be a real bastard. I don't like being put in that position. What would you do?"

Sandy: "If she looks anything /411 she looks on television --"

Jonathan: "Size 38,/412 with a D cup."



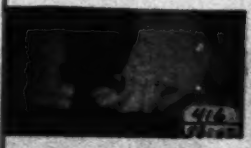
Sandy: "Well, looks 413 aren't everything."
Jonathan: "Believe 414 me, looks are everything." 415
Sandy: "Maybe."



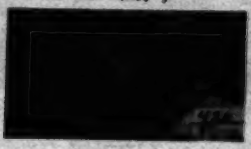
SCENE XXIX (56: 3)

BEDROOM SCENE

(Jonathan lies on his back with legs over edge of the bed. Bobbi kneels on floor alongside bed with her head between his legs.) 416
Jonathan: "I'm hungry." 417
Bobbi: "I'll get up." 418, 419



Jonathan: "Why do we always have to eat so 420 late?"
Bobbi: "'Cause I work 421 late, dumbbell."
Jonathan: "Why do you work at all?" 422



Bobbi: "It brings in extra money."
Jonathan: "I make enough."
Bobbi: "Do you want me to quit 423 working?"
Jonathan: "Thought you were bored with it."
Bobbi: "I am." 424
Jonathan: "So quit."

Bobbi: "What'll I do?"

Jonathan: "What do other women do?"

Bobbi: "Have children?/ (Noise) Well, you asked me!"/ (Noise of shower.) (Radio music/-- Dick Powell singing "I'll String Along With You.")

425, 426, 427 428

429 thru 435

SCENE XXX (57:46)

BOBBI PREPARES DINNER - THEY TALK

(Radio program going on --)

Man: "Hey, was that you?"

Man: "Yeah, that was me."

Man: "No kiddin'!"

(Various inaudible remarks -- "I was sure it was his voice" -- (--inaudible--). "I told you I wanted it" -- (--inaudible--) "Bo-do-dee-o--" (--inaudible--) "Yeah?" (--inaudible--) "Come on let's go" -- "we're on our way to a (--inaudible--) "All, right (--inaudible--) go ahead --").

Jonathan: "What about my beer?"

Radio Voice: "Ladies and gentlemen, it has been --"

Bobbi: 'We're all out --/"

Voice: (--inaudible--) has something to say to you. A change in program is necessary."

Jonathan: "I really wanted a bear --"

Bobbi: "Do you want me to run out to the corner?"/436

Jonathan: "You're too tired." (--inaudible--)

Bobbi: "I'm tired, but I'm all right."

Jonathan: "I'll get it."

Bobbi: "No, I'll get it."

Jonathan: "It was my fault. I knew I should have reminded you when I called this afternoon."

Bobbi: "I'm sorry --"

Jonathan: "You're more tired now than when you were working."

Bobbi: "I'm in the house all day."

Jonathan: "Didn't you get up at all today? What'd'ya do? I mean, when you're not telephoning."

Bobbi: "I'm not on the phone that much."

Jonathan: "It took me forty-five minutes to get through this afternoon."

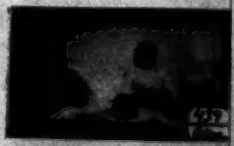
(Singing - "You may not be an angel --")

Jonathan: "I'll go and get the bear."

Bobbi: "I'll go."

Jonathan: "I thought you were too tired."

Bobbi: "I haven't been out all day."/437



Jonathan: "Fresh air will do ya good."

Bobbi: "Will you walk with me?"

Jonathan: "I may as well go myself."

(Pause)/438

Jonathan: "Want to make love?
We haven't in a week."

Bobbi: "It was a week?"/439

SCENE XXXI (61:13)

SANDY TELLS JONATHAN OF HIS SEX LIFE WITH SUSAN

Sandy: "That's right. Susan and I do all the right things. We undress/440 in front of each other -- we spend 15 minutes on foreplay, we experiment, do it in different rooms -- it's a seven-room house -- We don't believe in making a ritual out of it. We do it when we feel like it. We don't feel we have to be passionate all the time. Sometimes it's even more fun necking. We're considerate of each other's feelings. I had a tendency -- men, I guess, have -- to be selfish./441 But I stopped. I don't do that now. We try to be patient. And we are patient -- and gentle with each other. (Sighs.) (Pause) Maybe it's just not meant to be enjoyable with women/442 you love."/443

Jonathan: "Sandy -- do you want to get laid?"/444

Sandy: "Please."

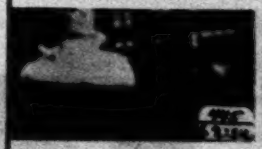
SCENE XXXII (62:29)

AT TENNIS COURT - JONATHAN AND SANDY REGARD CINDY, TO BOBBI'S ANNOYANCE

(Game is not shown. Jonathan and Sandy are playing, then Jonathan

and Cindy. Bobbi watches at first, then turns her back in disgust.)/ 445, 446

Sandy: "Very nice. Very nice indeed./ 447 Cindy, put your (--inaudible--) I almost had it."



Jonathan: "Sure, you almost had it."

Sandy: "Almost had it, right, Cindy? See that, Cindy?"

Jonathan: "He was lucky!"/ 448

(They are shouting - voices confused.)

Man: "That's all! Bastard -- That was out."

Man: "Bull shit it was."

Man: "Oh, bull--."/ 449

Jonathan: "Yeah, let Cindy be the judge."

Sandy: "We'll do it over, all right?"

Jonathan: "Right. Fair's fair."/ 450

Sandy: "Deuce! You see that shot, Cindy?"

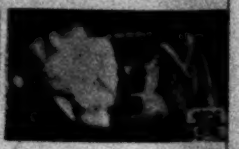
Jonathan: "Now we got -- tennis!"

(Grunts, etc.)

Man: "Game!"/ 451

Man: "Luck!"

Jonathan: "Luck my ass!/ 452 Hoo, hoo! You want to take me on, Cindy?" 453



Bobbi: "It's my turn."

Jonathan: "Aw, c'mon, Bobbi -- you're so awful."/454

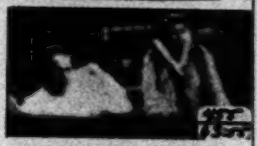
Jonathan: "You serve. Very nice! Hey, you play well. Hey, Sandy,/455 will you look at this girl?"

Sandy: "Terrific, Cindy!"

Jonathan: "Whoo! Hey, she's backin' me up! I'm not kidding, look at this -- she's backin' me up!"

Sandy: "Beautiful!"/456

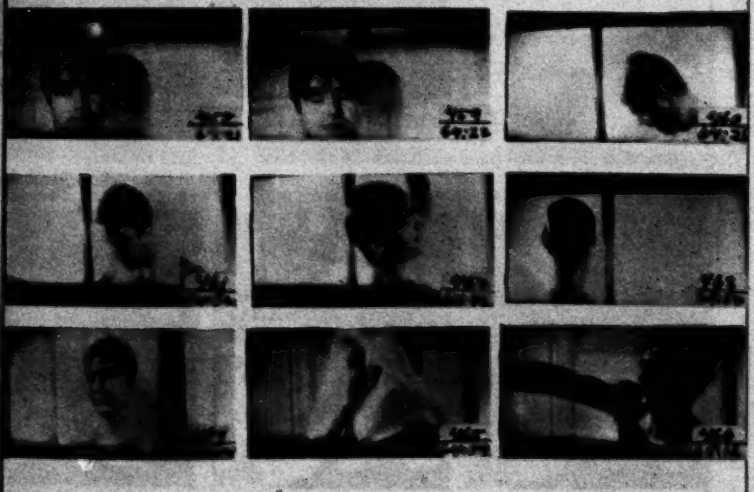
Jonathan: "Boy -- will you look at this? 40-Love. And I'm not takin' it easy on her,/457 either."



SCENE XXIII (64:08)

JONATHAN'S BEDROOM. JONATHAN AND BOBBI ARGUE

(Sound of water running. Long pause.)/458 thru 471



Jonathan: "You and Lord and Taylor's are gonna have to work out a trial separation."/ 472

Bobbi: "I had the water running. What did you say?"/ 473

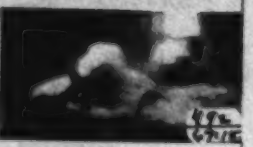
Jonathan: "You and Lord and Taylor's are going to have to work out a trial separation."/ 474, 475, 476

(She walks over and looks.)

Bobbi: "Look at the date. Five months have gone."/ (Pause) 477 thru 482

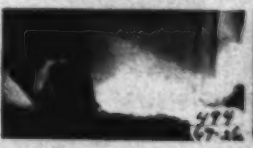
Bobbi: "Sorry I cost you so much money." 483

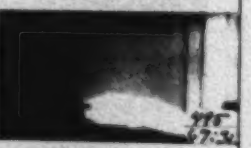
(Phone rings six times. 484 thru 492 Unanswered. Long Pause.)

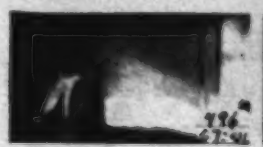


Bobbi: "I want to get married." 493, 494

(Door slams.) 495, 496, 497







Bobbi: "Are you tired of me, Jonathan? The answer's yes."

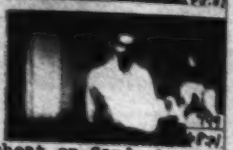
Jonathan: "I didn't say yes."

Bobbi: "You said 'am I ever'. I need more in life than this."

Jonathan: "Who put you up to this? Your psychiatrist? After a long, exhaustive bed hunt you've finally chosen me."

Bobbi: "Cindy's not 498 a virgin either."

Jonathan: "What? oooohh, I get it — is that 499 what brought this on? Your mind is unbelievable. You have to have a low opinion of me, thinking that I would do that to Sandy."



Bobbi: "Oh, no -- you wouldn't want to cheat on Sandy."

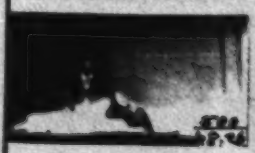
Jonathan: "Ooohh, now it's Sandy."

Bobbi: "Well, he spends 500 half his life over here."

Jonathan: "Wait a minute. A second ago, you had me screwing Cindy. Who am I screwing now? Sandy??"

Bobbi: "You're going 501 too fast for me."

Jonathan: "I'm going too fast for YOU. Your little mind operates like an IBM - like a pinball machine. First, Cindy. Oh, no, not Cindy. How about Sandy? 502



How about Cindy and Sandy? Talk about the pot calling the kettle! The day I got an earful of your checkered past I felt like a celebate!"

Bobbi: "You 503 made me tell you."

Jonathan: "Sure, I twisted your arm."

Bobbi: "It got you hot." 504

Jonathan: "Something has to." 505 (Door slams.)

Bobbi: "You have such contempt for me."

Jonathan: "Kid, you worked hard for it. [506] It's yours."

Bobbi: "The way you paw me at parties."

Jonathan: "How, affection is contempt. [507] Upside down. Everything upside down."

Bobbi: "Feeling me up in public is not affection."

Jonathan: "Will you come on --." [508]

Bobbi: "I know that I sleep all day. [509] I know I'm doing a terrible job, but you're not helping me any."

Jonathan: "And who helps me?"

Bobbi: "I help you." [510]

Jonathan: "Your kind of help I can do without." [511]

Bobbi: "Can you? Can you really?" [512]

Jonathan: (Frustrated noises.) "You'll do anything you can to ruin my day, won't you? I got up today feeling so good. [513] You couldn't leave us alone. (Slamming sound.) We were doing so well."

Bobbi: "What?"

Jonathan: "At one time -- at one time it was GREAT what we had. The kidding around, it can't have a natural span.

Affairs can't 514/ dissolve in a good way -- there's always got to be poison. I don't see why. I REALLY DON'T SEE WHY?"

Bobbi: "Jonathan -- do you want it over between us?"

Jonathan: "Why does it have to be one way or the other?"

Bobbi: "You don't want me to leave?"

Jonathan: "I want you right here -- where you belong."

Bobbi: "And what 515/ about you?"

Jonathan: "When I'm here, I'm here. When I'm not here, I'm -- I'm there."

Bobbi: "Where?"

Jonathan: "Where ever!"

Bobbi: "Yeah. I'm a man-eater or a ball-bustering castrater. I WANNA GET MARRIED."

(Jonathan is slamming things around on the dresser.)

Jonathan: "ALL RIGHT. Where the fuck is my shoehorn? This place is a mess. There's not any food in the house -- half the time you look like you fell outta bed. You spend more time in bed than any other human being past the age of six months that I ever heard of."

Bobbi: "The reason I sleep all day is 'cause I can't stand my life!"

Jonathan: "What life?"

Bobbi: (Crying) "Sleeping all day!" (She is sobbing.)

Jonathan: "For that sort of thing, I'd fall in love with you all over again."

Bobbi: "Marry me, Jonathan -- please marry me."

Jonathan: "You're trying to kill me."

Bobbi: "Marriage isn't death."

Jonathan: "Why now?"

Bobbi: "Because two years ago I slept - eight hours. A year ago, it was twelve. It's up to fifteen now, pretty soon it's gonna be twenty-four."

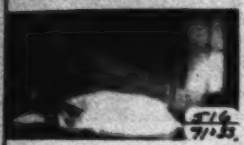
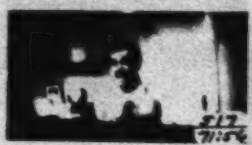
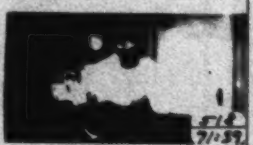
Jonathan: "What are you trying to do -- scare me?"

Bobbi: "I need a life."

Jonathan: "GET A JOB!"

Bobbi: "I don't want/ 516 a job. I want you." (Sobbing.)

Jonathan: "Don't take/ 517 and blame me! Get out of the house!/ 518 Do something useful, God damn it!"

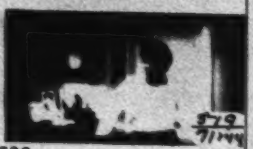




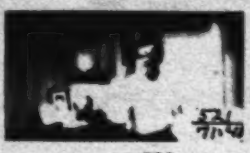
Bobbi: "You wouldn't let me work when I wanted to."

Jonathan: "That was a year/ 519 ago."

Bobbi: "You throw a tantrum every time you call and I'm not home."/ 520

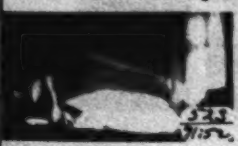
Jonathan: "Look, sister,/ 521 I'm out there in the jungle. EIGHT HOURS/ 522 A DAY."

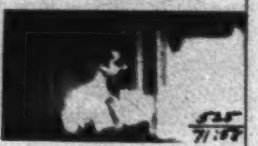




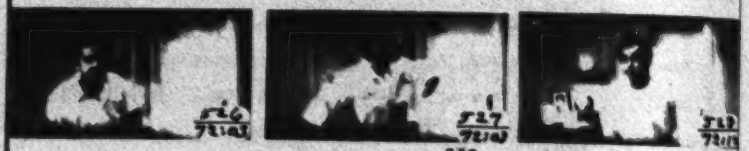
Bobbi: "You wouldn't even let/ 523 me canvas for Kennedy."

Jonathan: "YOU WANT A JOB?/ 524 I GOT A JOB FOR YOU. Fix up this pig sty./ 525 You get a pretty God damn good salary for testing out this bed all day.

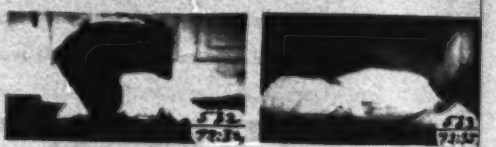




You want an extra fifty dollars a week?/526 TRY VACUUM-
ING. You want an extra hundred? MAKE THIS GOD DAMNED
BED./527 TRY OPENING SOME GOD DAMNED WINDOWS -- THAT'S
why you can't/528 stand up in here.



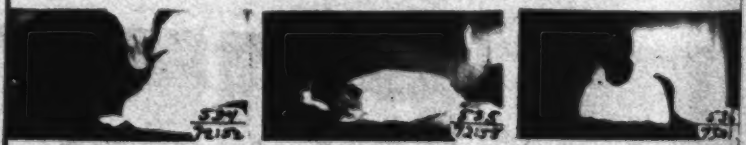
The Goddammed place smells/529 like a coffin. Ooooh,
Bobbi,/530 you don't need me. Why do you let yourself in
for this kind/531 of abuse? Walk out! Leave me, please
leave me. For God's/532 sake, I'd almost marry you if
you'd leave me."/533



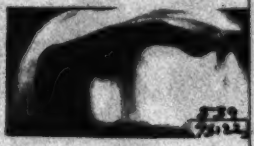
Bobbi: "You call that abuse -- you don't know what I'm used to.
With all your carrying on -- pretending you're
a gift. (Pause.) So what's it gonna be?"/534

Jonathan: "You sure know how to screw things up."

Bobbi: "So where/535 does that leave us?"/536



Jonathan: "Are you giving me an ultimatum? Is this an ultimatum? Answer me, you ball-busting, castrating, son of a cunt-bitch./[537] Is this an ultimatum or not? Because if it is, I'm gonna tell you what you can do with your ultimatum. I'm gonna tell you what you can do with it/[538] -- You can make this God damn bed -- that's what you can do with it! (Inaudible) TAKE OFF THESE FILTHY SHEETS, THAT'S WHAT YOU CAN DO WITH IT!"/[539]



SCENE XXXIV (73:19)

JONATHAN'S APARTMENT. JONATHAN AGREES TO SWAP BOBBI FOR CINDY. BOBBI ATTEMPTS SUICIDE.

(Doorbell rings.)/[540, 541]

Jonathan: "She's not ready."/[542]

Sandy: "We're a little early."

Jonathan: "You're looking good, Cindy."

Sandy: "I do my best."

Cindy: "Will Bobbi be long?"

Jonathan: "Uh, -- no./[543] Say, ah -- do we have to go to this party?"

Sandy: "How about it, Cindy?"/[544]

Cindy: "Where's the powder room?"

Jonathan: "Uh -- right there."

Cindy: "I'm going. You do what you want."/545

Jonathan: "Man -- she's really something."/546

Sandy: "I'm so bored I'm goin' out of my mind."

Jonathan: "Bored! With that? You must be kidding. Do you have to go to this party? Stick/547 around."

Sandy: "No. It's better that I go."

Cindy: /548"Here, I just did my hair./549 (Looking around the apartment.) I've got this at home. How's your tannis game, Jonathan?"

Jonathan: "We'll have to have a rematch."

Cindy: "Any /550time!"

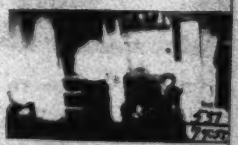
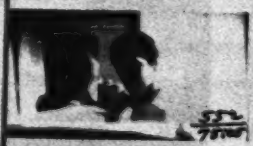
(Music) /551, 552

Jonathan: "Is she always that way?"

Sandy: "You know what she is?"

Jonathan: "Boy, is she competitive."

Sandy: "She is very competitive./553 But I find that attractive."

Jonathan: "You know her problem? She wants balls."/554

Sandy: "She's all right."

Jonathan: "I'm not criticizing."

Sandy: "I wish she were more feminine."

Jonathan: "She's a little masculine, Huh?" 555

Sandy: "I just wish -- she wouldn't always demand her own way."

Jonathan: "Got a great body on her."

Sandy: "I have to treat her like a child. 556 Give her everything she wants."

Jonathan: "I wouldn't mind giving her something."

Sandy: "You got Bobbi. I sure 557 don't have it that good."

Jonathan: "Bobbi? Are you kidding?"

Sandy: "I've never seen a body like that." 558

Jonathan: "She can do with a little more of what Cindy's got. She's so Goddamned passive."

Sandy: "Yeah? I wouldn't mind Cindy just lying still once." 559 She's so busy giving instructions in bed it's like close order drill."

Jonathan: (Laughs) "Yeah? I wouldn't mind a little of that. As long as she doesn't forget who's boss." 560

(Low conversation over music.)

Jonathan: "You wouldn't want to swap her sometime, would you? 561,562,563
(Laughter.)

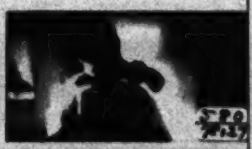
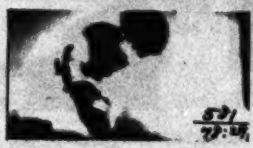
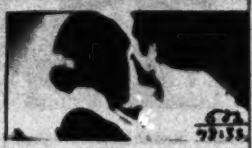
Jonathan: "What do you say?/ 564 Might liven things up a bit."/ 565, 566
(They giggle.)

Jonathan: "She can miss one party. We've heard of (--inaudible--
Sandy: "What about Bobbi?"
Jonathan: "She's so mad at me,/ 567 she'll jump all over you just for revenge. (Laughs.)
Sandy: "Hmmm, you like that,/ 568 huh? Seriously --"
Jonathan: "She's in the bedroom. If you're quiet, you can do it, and she won't even know."/ 569 (Laughter from both.)

Jonathan: "Hmmm./ 570 Give me a minute."/ 571, 572

(New tune - "Amapola" starts.)/ 573, 574

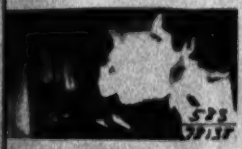
Cindy: "Tell Sandy it's time to leave. (They are dancing.)
/ 575 I hope you dance better than you play tennis."/ 576 thru 582

Jonathan: "Sandy won't mind --"/583

Cindy: "What's Sandy got to do with it?"/584

Jonathan: "You're his girl. (Pause.)/585, 586 He said it would be okay./587, 588



(Music stops.)

Cindy: /589 "What did Sandy say?"

Jonathan: "Aaahh -- you and me,/590 uh -- you know."/591

Cindy: "That was his idea -- you had nothing to do with it."

Jonathan: "A little."

Cindy: "A little? Or a lot?"

Jonathan: "This much." (Measures with hands.) 592

Cindy: "I'm surprised it took you this long to get around to it." (She walks towards door.) 593

Cindy: "Sandy 594 and I have a party to go to."

Jonathan: "Sandy's busy." 595 (She walks back towards him.) 596 thru 600

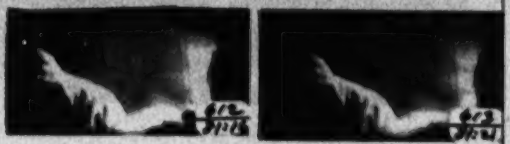
Cindy: "If you want to come around sometime by yourself -- that's one thing. I've been expecting that. But you tell Sandy -- that if he lays one hand 601 on that tub of lard in there, not to come home. 602 So you call me." 603,604,605

(Steps. Long pause.)

Jonathan: "Jesus."/606, 607, 608

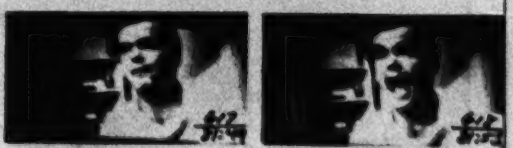
(Pause. He walks over, opens bedroom door. Bobbi lying on bed - Sandy is on the phone.)

Sandy: "She's/609 semi-comatose. Better send a resuscitation unit and an airway./610 Uhhh, be ready to give her an IV on admission,/611 (''inaudible'') Tell 'em/612 we'll put her in intensive care. (Pause. He looks at Jonathan.) Bastard."/613



(Sound of running -- door slams.)/614, 615, 616

Jonathan: (Screaming) "VERY SLICK. VERY CLEVER./617 BUT IT'S NOT GOING TO WORK,/618 BOBBI!"



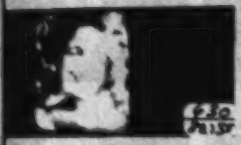
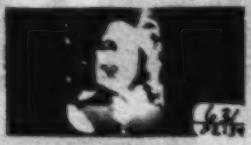
SCENE XXXV (82:12)

TIME JUMPS TO THE LATE '60'S. SANDY AND HIS HIPPY GIRL FRIEND ARE IN JONATHAN'S APARTMENT. JONATHAN, USING A SLIDE PROJECTOR, PROJECTS PHOTOS ON A SCREEN OF GIRLS WITH WHOM HE HAS HAD SEXUAL EXPERIENCES.

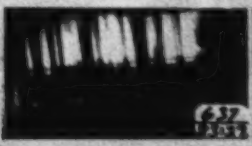
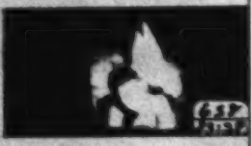
(Organ music - ice skating theme.) 619 thru 627

Jonathan: "That's Bonny. My first love. 628 She lived upstairs from us. We started exposing ourselves to each other at ten. We got caught on the roof one day by my mother, 629 who washed my mouth out with soap. I never got the connection." (Laughter.) Here's Emily. My first steady, until she moved off the block at eleven. I never laid a hand on her.

"Uh, Mildred/630 -- I think this one's name was. She followed me around/631 at school. The fellows kidded me about her. I warned her, if she didn't stop, I'd beat her up. She picked up her skirt, dropped her drawers and shoved her ass/632 at me. So I got my first sight of ass at twelve./633 Marsha/634 13 and 1/2 - thereabouts. I kissed her one night at a spin-the-bottle party./635

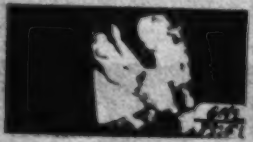



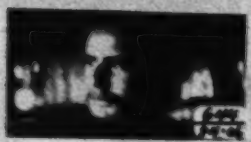
This one's Rosalie./636 Rosalie looked just like Elizabeth Taylor in "National Velvet". Had a crush on Rosalie from 14 to 15 and I never went near her. In those days we had illusions./637 Here's /638 Charlotte. Not much on looks, but great tits for fifteen.

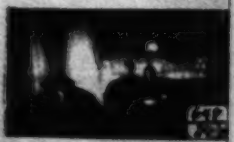
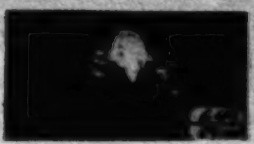
That's /639 Lenny Hartman's sister -- my first French kiss 16 years old. Here's Gloria./640 The best built girl in Ervander Child's.

I took her to the Bronx Zoo once and on the bus, copped a cheap feel. 641, 642 Here's Gwendolyn. I went with her for a year trying to get her to put out -- but she thought I was too nice and was saving me for marriage. Every guy at Ervander must have gotten into her pants except me. Here's my first 643, 644, 645 - (84:03) no, that one was a mistake.





Here's Eileen -- my very first fuck. She was a modern dancer at the Swarthmore. Great body on her -- what a waste. Frigid. 646, 647 Here's Nancy - a sweet kid. She went in for biology -- very frigid. 648, 649, 650

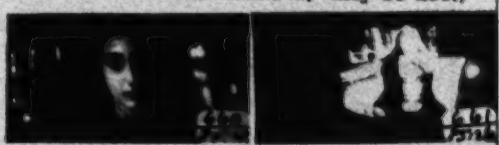



Here's Bobbi! My wife -- fastest tits in the west. And the king of the ball-busters. She conned me into marrying her, now she's killing me with alimony.

651
Wonder how this one got in here? This is my little girl, Wendy. Princess, I call her. Isn't she a dreamboat? 652, 653

Here's a real cunt. I forget her name -- a Nazi. I banged her in Berlin. 654, 655 Here's somethin' I want with for a couple of months. First time I banged her was on a yacht race to Nassau. 656, 657 This slob I want with for a year, until I got so sick of her ball-busting I couldn't get it up any more. I can't remember her name. 658,659

This was my Jap in the sack. I heard that Oriental girls were different -- not in America, they're not. 660, 661



Here's a sixteen year old I gave twenty bucks to one night in the Village when I was drunk. Maybe you know

her, Jennifer, she gave me a dose./662, 663, 664

(Nonsense --stuttering) That's all, folks! (Pause)

What're you crying for, it's not a Lassie movie!"

(Pause.)/665 thru 671

SCENE XXXVI (87:01)

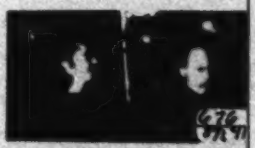
NIGHT SIDEWALK SCENE, JONATHAN AND SANDY WALK AND TALK /672

(Traffic noice. Horns blowing)

Jonathan: "Sorry about that."

Sandy: "So? What else is new?"/673

Jonathan: "To tell you the truth, I don't see anybody any more."



Sandy: "Neither do we."/674

Jonathan: "Well -- you got each other. I thought she was your daughter when you first came in./675

Sandy: "In a lot of ways, she's older than I am."

Jonathan: "Yeah."

Sandy: "She knows worlds I can't even begin to touch yet."

Jonathan: "Sandy, please --"

Sandy: "I found out who I am."

Jonathan: "You're/676 in big trouble."

Sandy: "The same old Jonathan."

Sandy: "The same old Jonathan."

Jonathan: "(--inaudible--) better place."

Sandy: "Let me talk to her about you, Jonathan."

Jonathan: "Talk to her about me! I'm forty -- she's NINE!"

Sandy: "You just don't get it, do you?"

Jonathan: "Oh, I get it all right. I've been getting it for a long time. What's the point?/677 Sandy, you've found a good piece a ass. God bless ya. You're my friend. I'm happy for you -- as long as it lasts, I'm happy for you. You deserve to be happy -- I mean it. Why fight? OK? All those games -- Jesus Christ."

Sandy: "You don't need those games,/678 Jonathan. I know -- I've played more games than anyone. The obedient son game, the bright student game, the cocksman's game, the respectable husband game, the good father game, the specialist game --"

Jonathan: "Al right."

Sandy: "Games don't impress Jennifer -- just life -- just love."

Jonathan: "Yeah. Well, I don't wanta argue with you, Sandy -- so let's just agree to, uh, disagree, OK? Don't make me mad, OK?"

Sandy: "Jennifer /679 knows more at 18 than Susan knows to this day."

Jonathan: "You've found yourself a real jewel, OK?"

Sandy: "She's my love teacher."

Jonathan: "You finally got it up, huh?"

Sandy: "You give off such bad vibrations."

Jonathan: "Bad vibrations. Sandy,/680 I love you, but you're a schmuck. You were always young, Sandy -- open. You were schmucky a lot of the time, but maybe schmuckiness is what ya need to stay young and open. Listen. Don't listen to me. You're doing great, and I'm makin' money."/681

Sandy: "You can find what I've found, Jonathan."

Jonathan: "Don't make me insult you."

(Sound of sirens, throughout, grows louder,)/682

SCENE XXXVII (89:30)

PROSTITUTE, LOUISE, PERFORMS FELLATIO ON JONATHAN IN HIS APARTMENT /683,684,685,686

Jonathan: "Women."

Louise: "All ball-busters, right?"

Jonathan: "You know it./ 687 You think of some of the things he has to dip into -- any guy with a conscience has a right to turn soft. Am I right, Louise?"

Louise: "You're always right, lover."/ 688

(Jonathan lies down on bed, spreads legs. Louise kneels between them, her arms on his legs.)

Louise: /"I don't think we're gonna have any/ 689, 690, 691 trouble tonight." 692

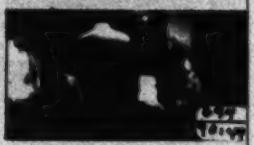
Jonathan: "Ya don't."

Louise: "No, I don't."/ 693

Jonathan: "You sure?"

Louise: "You wanna bet?"

Jonathan: "How much?"/ 694



Louise: "The sky's the limit!"

Jonathan: "All right."

Sandy: "Games don't impress Jennifer -- just life -- just love."

Jonathan: "Yeah. Well, I don't wanta argue with you, Sandy -- so let's just agree to, uh, disagree, OK? Don't make me mad, OK?"

Sandy: "Jennifer 679 knows more at 18 than Susan knows to this day."

Jonathan: "You've found yourself a real jewel, OK?"

Sandy: "She's my love teacher."

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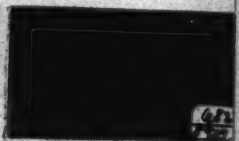
Sandy: "You give off such bad vibrations."

Jonathan: "Bad vibrations. Sandy, 680 I love you, but you're a schmuck. You were always young, Sandy -- open. You were schmucky a lot of the time, but maybe schmuckiness is what ya need to stay young and open. Listen. Don't listen to me. You're doing great, and I'm makin' money." 681

Sandy: "You can find what I've found, Jonathan."

Jonathan: "Don't make me insult you."

(Sound of sirens, throughout, grows louder,) 682



SCENE XXXVII (89:30)

PROSTITUTE, LOUISE, PERFORMS FELLATIO ON JONATHAN IN HIS APARTMENT 683,684,685,686

Jonathan: "Women."

Louise: "All ball-busters, right?"

Jonathan: "You know it./ 687 You think of some of the things he has to dip into -- any guy with a conscience has a right to turn soft. Am I right, Louise?"

Louise: "You're always right, lover."/ 688

(Jonathan lies down on bed, spreads legs. Louise kneels between them, her arms on his legs.)

Louise: /"I don't think we're gonna have any/ 689, 690, 691 trouble tonight." 692

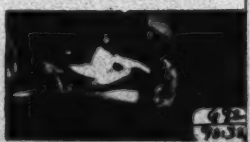
Jonathan: "Ya don't."

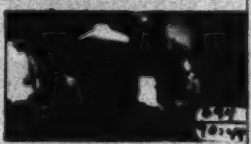
Louise: "No, I don't."/ 693

Jonathan: "You sure?"

Louise: "You wanna bet?"

Jonathan: "How much?"/ 694





Louise: "The sky's the limit!"

Jonathan: "GOD DAMN!!" (He jumps up, paces room angrily.)

Louise: "What did I do?"

Jonathan: "You're doing it all wrong."

Louise: "I'm doing it like always."

Jonathan: "You never said that before."

Louise: "Said what?"

Jonathan: "SKY'S THE LIMIT."

Louise: "Sure I did."

Jonathan: "Never."

Louise: "What do I say?"

Jonathan: "You've forgotten it." 695

Louise: "Uuhhh — a hundred. I say a hundred." (Pause.)

Jonathan: "Okay."

Louise: "It just came out."

Jonathan: "I just want it right, that's all." 696

(He lies down again; they resume places and start dialogue routine over.)

Louise: "I don't think 701 we're gonna have any trouble tonight." 702

Jonathan: "You don't."

Louise: "No. I don't."

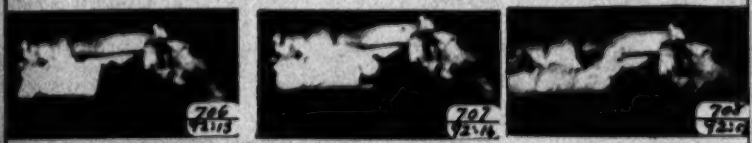
Jonathan: "Are you/ 703 sure?"/ 704

Louise: "You wanna bet?"/ 705

Jonathan: "How much?"/ 706

Louise: "A hundred?"/ 707 thru 710 (Pause)

Jonathan: "You sound pretty/ 711 sure."



Louise: "Your kind of a man/ 712 -- why shouldn't I be sure?"/ 713

Jonathan: "What/ 714 kind of man am I?"/ 715

Louise: "A real man. A kind man."/ 716

Jonathan: "I'm not kind."

Louise: "I don't mean weak-kind, the way so many men are. I mean the kindness/717 that comes from enormous strength from within -- a power so strong that every act -- no matter what -- is more proof/718 of that power. That's what all women resent. That's why they try to cut you down. Because of your knowledge/719 of yourself --

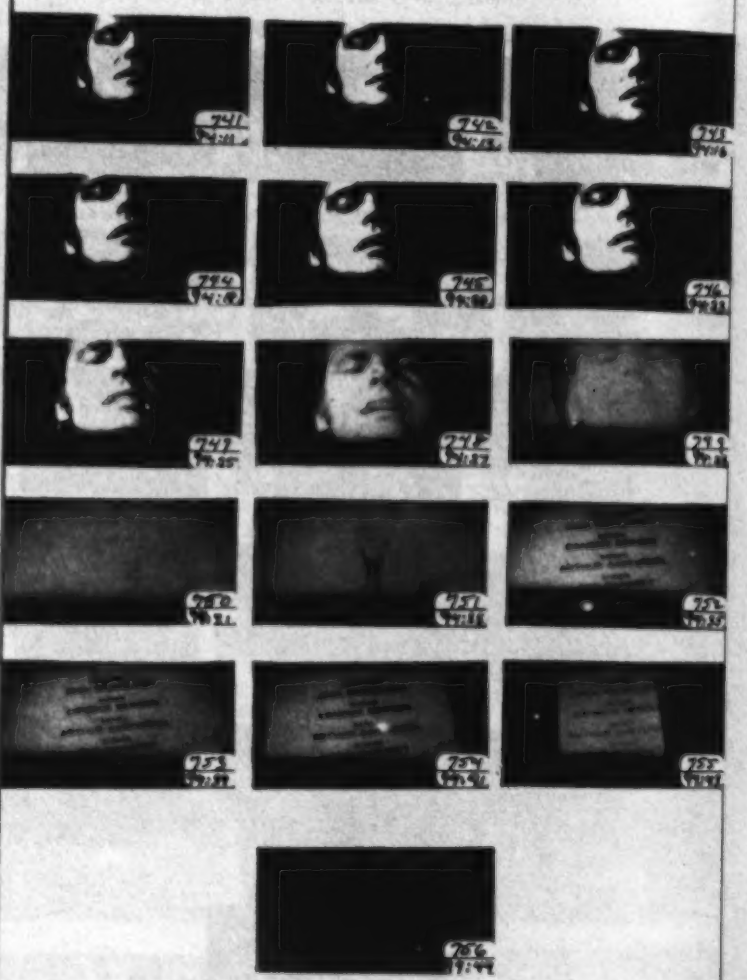
and them is so right, so true that it exposes the lives which they, every /720 scheming one of them, live by. It takes /721 a true woman to understand the purest woman form of love is to love a MAN --

who denies/722 himself to her. A man who inspires/723 her -- worship/724 -- because he has no need/725 for any woman/726 -- Because he has himself./727

728 /(--inaudible--) better -- more beautiful,/ 729 more powerful, more perfect -- you're getting hard/ 730 --

more strong,/ 731 more masculine,/ 732 more extraordinary -- /733 more --robust!/ 734 -- It's rising,/ 735 -- more virile, domineering,/ 736, 737 more irresistible/ 738, 739, 740 -- It's up. (--inaudible--)."

(Loud music.)



(Ice skater is shown again, skating, as film ends.)

THE END

APPENDIX B

Time-Motion Study* of Film "CARNAL KNOWLEDGE"

B-1 thru B-27

*A time-motion study is a chronological series of still photographs of a motion picture film, timed in their relative order of appearance, which, by "stopping" the movement appearing on the motion picture screen and recording the same, permits the type of conduct being portrayed thereon to be analyzed in a fair and accurate manner.

"CARNAL KNOWLEDGE"
Part 1 of 13 Parts

Held to be in violation of Georgia Obscenity Statutes in Jenkins v. State of Georgia 230 Ga 726, 199 S.E.2d 183. (July 2, 1973)

-B-2-

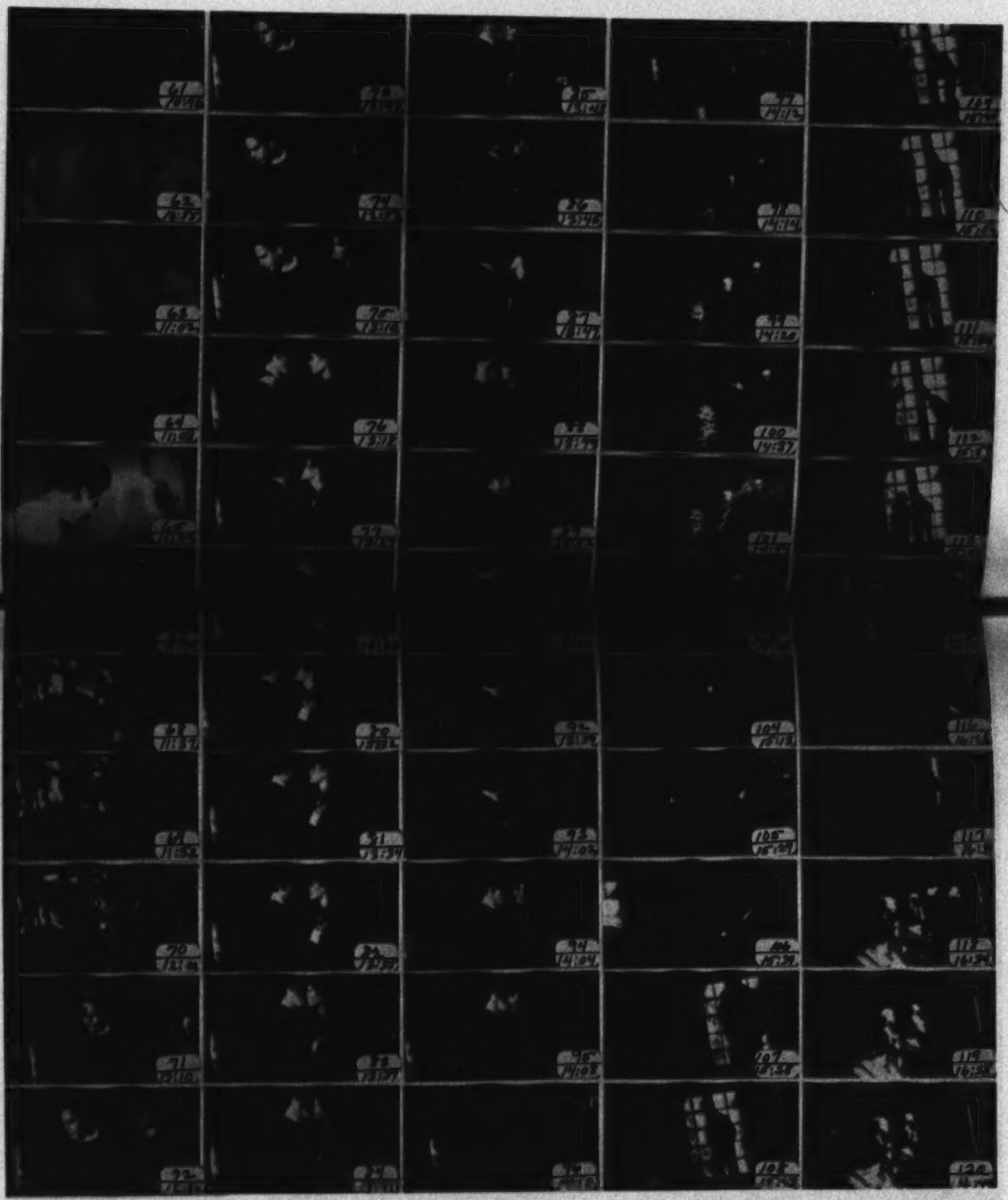
COPY BOUND CLOSE IN CENTER

-B-3-

Credits appear as Jonathan and Sandy discuss girls and sex (1 thru 22). Jonathan and Sandy meet Susan at college dance (23-44). Dorm room at night. Sandy and Jonathan discuss Susan (45-50). Sandy walks Susan home and they kiss (51-58). Jonathan urges Sandy to go "all the way" with Susan (59-60).

"CARNAL KNOWLEDGE"
Part 2 of 13 Parts

Held to be in violation of Georgia Obscenity Statutes in Jenkins v. State of Georgia 230 Ga 726, 199 S.E.2d 183. (July 2, 1973)



-B-4-

-B-5-

Jonathan urges Sandy to go "all the way" with Susan (61-66). Sandy places his hand on Susan's breast. Susan places her hand in the area of Sandy's genital organ (67-97). Sandy demonstrates how Susan unzipped his fly and "did it", (98-113). Jonathan phones Susan for date (114-117). Jonathan dates Susan (118-120).

"CARNAL KNOWLEDGE"
Part 3 of 13 Parts

Held to be in violation of Georgia Obscenity Statutes in Jenkins v. State of Georgia 230 Ga 726, 199 S.E.2d 183. (July 2, 1973)

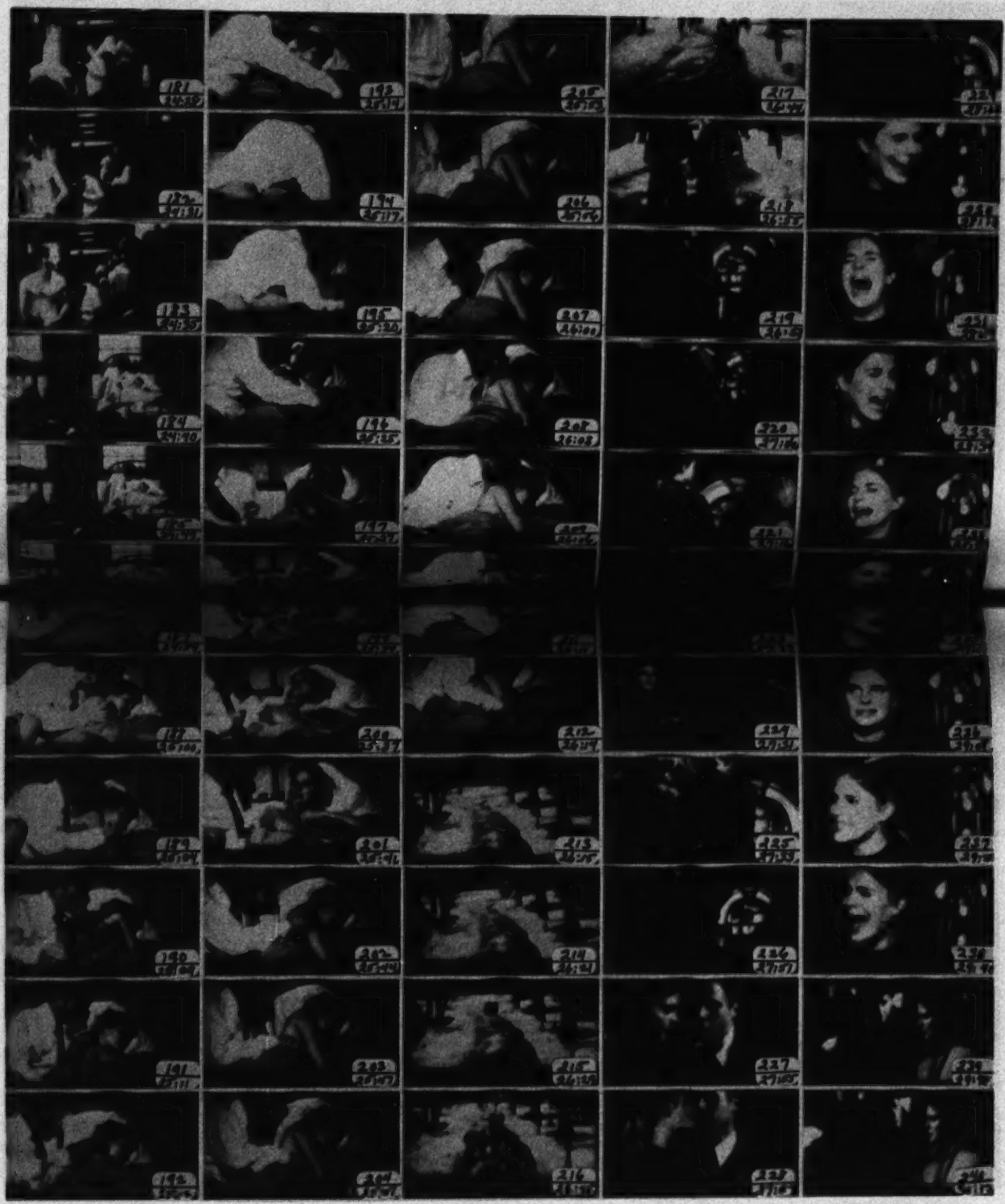
-B-6-

-B-7-

Jonathan dates Susan (121-129). Dorm at night. Sandy discusses Susan with Jonathan (131-139). Jonathan and Susan on date (140-141). Dorm at night. Jonathan tells Sandy of "Myrtle" (Susan) (142-150). Jonathan and Sandy have sexual intercourse on grass (151-175). Jonathan tells Sandy he "got laid". Sandy decides it's his turn (176-180).

"CARNAL KNOWLEDGE"
Part 4 of 13 Parts

Held to be in violation of Georgia Obscenity Statutes in Jenkins v. State of Georgia 230 Ga 726, 199 S.E.2d 183. (July 2, 1973)



-B-8-

-B-9-

Sandy and Jonathan discuss Susan (181-183). Sandy and Susan have sexual intercourse in his dorm room (184-212). Sandy tells Jonathan he "got laid" by Susan (213-218). Jonathan and Sandy date Susan at dance (219-238). Jonathan and Susan talk (239-240).

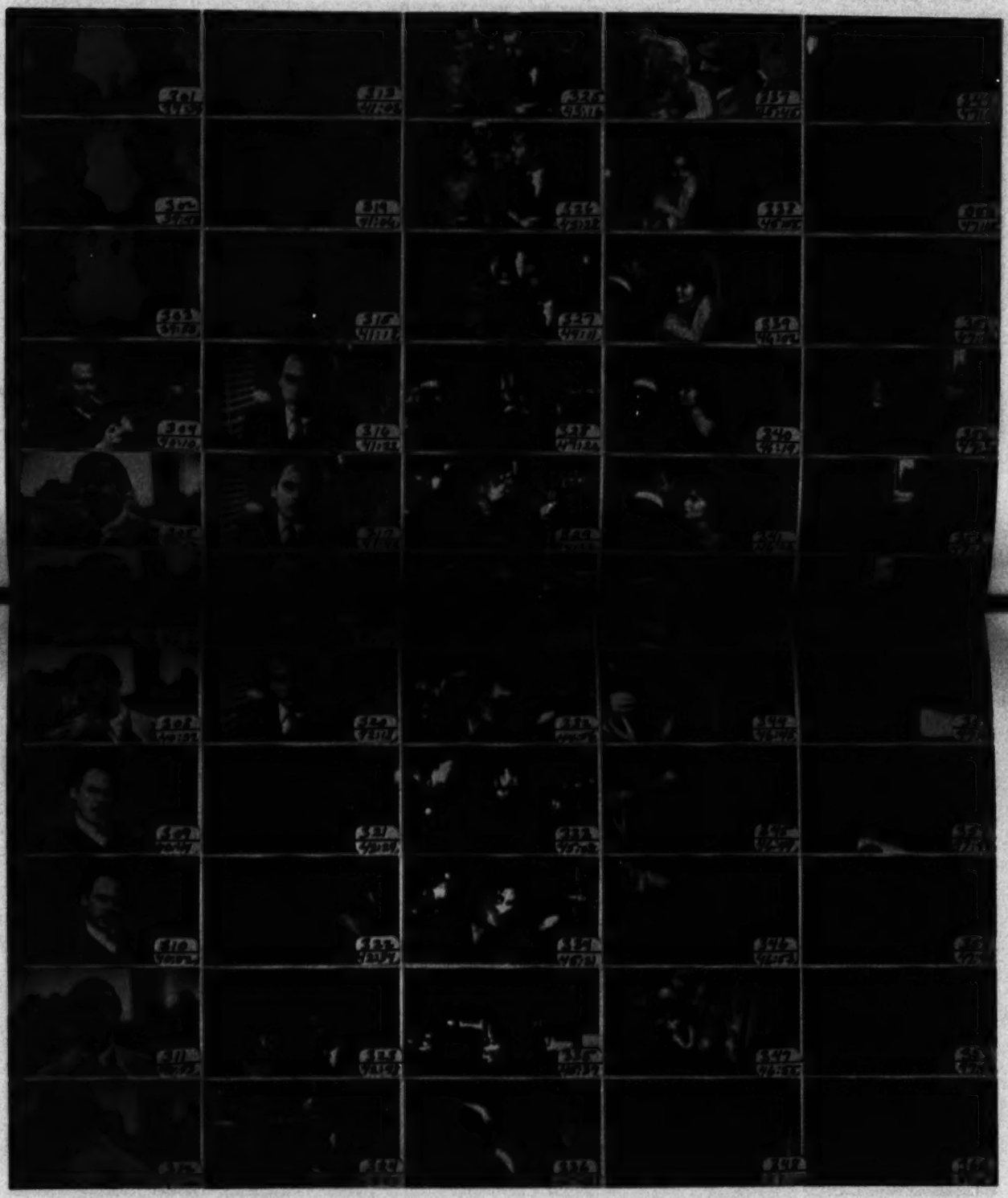
CARNAL KNOWLEDGE"
art 5 of 13 Parts

Held to be in violation of Georgia Obscenity Statutes in Jenkins v. State of Georgia 230 Ga 726, 199 S.E.2d 183. (July 2, 1973)

Jonathan and Susan talk (241-246). Dorm at night. Sandy tells Jonathan his progress with Susan (247-248). Jonathan warns Susan to tell Sandy of their relationship (249-255). Jonathan phones Susan. They argue (256-275). Sandy and Susan pack for trip, as Jonathan watches (276-281). Time moves ahead to late 1950's. Jonathan and Sandy meet at skating rink. They discuss sex (282-300).

"CARNAL KNOWLEDGE"
Part 6 of 13 Parts

Held to be in violation of Georgia Obscenity Statutes in Jenkins v. State of Georgia 230 Ga 726, 199 S.E.2d 183. (Julv 2, 1973)



Sandy and Jonathan discuss sex (301-320). Jonathan and Bobbi on date (321-335). They go to his apartment and engage in sexual intercourse (336-360).

"CARNAL KNOWLEDGE"
Part 7 of 13 Parts

Held to be in violation of Georgia Obscenity Statutes in Jenkins v. State of Georgia 230 Ga 726, 199 S.E.2d 183. (July 2, 1973)

-B-14-

-B-15-

Intercourse scene continues (361-363). Bobbi lies on bed in the nude. Jonathan invites her to shower with him (364-376). Bobbi asks Jonathan to "shack up with her" (377-403). Sandy and Jonathan reminisce (404-415). Bobbi places her head between Jonathans legs as he reclines on bed (416-420).

"CARNAL KNOWLEDGE"
Part 8 of 13 Parts

Held to be in violation of Georgia Obscenity Statutes in Jenkins v. State of Georgia 230 Ga 726, 199 S.E.2d 183. (July 2, 1973)

-B-16-

-B-17-

Bobbi gets up and prepares dinner and they talk (421-438). Sandy tells Jonathan of sex life with Susan (439-444). Jonathan and Sandy at tennis court play up to Cindy (445-457) Bobbi and Jonathan argue in his bedroom (458-480).

"CARNAL KNOWLEDGE"
Part 9 of 13 Parts

Held to be in violation of Georgia Obscenity Statutes in Jenkins v. State of Georgia 230 Ga 726, 199 S.E.2d 183. (July 2, 1973)

—B-18—

—B-19—

Bobbi fixes bra as a heated argument begins. Jonathan berates Bobbi (481-540).

"CARNAL KNOWLEDGE"
Part 10 of 13 Parts

Held to be in violation of Georgia Obscenity Statutes in Jenkins v. State of Georgia 230 Ga 726, 199 S.E.2d 183. (July 2, 1973)

Jonathan's apartment. Jonathan and Sandy agree to swap (Bobbie for Cindy) (541-573). Jonathan makes advances to Cindy (574-600).

"CARNAL KNOWLEDGE"
Part 11 of 13 Parts

Held to be in violation of Georgia Obscenity Statutes in Jenkins v. State of Georgia 230 Ga 726, 199 S.E.2d 183. (July 2, 1973)

Cindy tells Jonathan off (601-603). Bobbi attempts suicide (604-623). Time advances to late 1960's. Jonathan is showing Sandy and hippy girlfriend photo slides of his sex mates he has had (624-660).

"CARNAL KNOWLEDGE"
Part 12 of 13 Parts

Held to be in violation of Georgia Obscenity Statutes in Jenkins v. State of Georgia 230 Ga 726, 199 S.E.2d 183. (July 2, 1973)

-B-24-

-B-25-

Slide showing continues (661-671). Night scene. Jonathan and Sandy walk and talk (672-682). Jonathan's apartment. Prostitute Louise performs fellatio on Jonathan while talking to him, encouraging him (683-720).

"CARNAL KNOWLEDGE"
Part 13 of 13 Parts

Held to be in violation of Georgia Obscenity Statutes in Jenkins v. State of Georgia 230 Ga 726, 199 S.E.2d 183. (July 2, 1973)

Louise preparing to perform fellatio addresses her remarks to Jonathan's penis (722-749). Music comes in a skater is seen followed by film credits(750-756).

APPENDIX C

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Commonwealth Attorney letter of Oct. 19, 1971, regarding exhibition of "Carnal Knowledge" in Maysville, Kentucky and requesting advice and assistance	3
Charles H. Keating Jr. reply of Oct. 30, 1971.....	4
Commonwealth Attorney letter of Mar. 7, 1973, giving information as to disposition of criminal and civic proceedings against "Carnal Knowledge" in Maysville, Kentucky.....	5-6

WOODSON T. WOOD
COMMONWEALTH ATTORNEY
19TH JUDICIAL DISTRICT
MAYSVILLE, KENTUCKY

COUNTIES
MASON
FLEMING
BRACKEN

October 19, 1971

Mr. Charles H. Keating, Jr.
1811 Provident Tower
Cincinnati, Ohio 45202

Dear Mr. Keating:

Recently, after receiving several complaints, I called a special session of the Mason Grand Jury to view a film being shown at our local theatre titled "Carnal Knowledge". Although according to the standards which have prevailed in Mason County, this film would be obscene, unfortunately, it was only an "R" rated movie and had considerably more literary merit than the average "X" rated film. Nevertheless, the Grand Jury was so disgusted that they returned an indictment against the theatre chain and the manager for exhibiting an obscene movie.

As soon as the indictment was returned, the Court, at my request, ordered the film siezed for evidence, and is now in the hands of the Sheriff of Mason County. The attorneys for the theatre have requested that the film be returned, and that it be suppressed as evidence, and the Judge has directed that we file a memorandum, defendants to be filed on or before October 20, and ours to be filed within 25 days thereafter. I mention in passing that the circuit judge also viewed the film with the Grand Jury at the local theatre prior to the return of the indictment, and that the Grand Jury and all officers of the Court paid admission. It is my understanding that you are part of an organization that assists with the prosecution of this type of case. Accordingly, I would appreciate any advice which you might be able to furnish.

Yours truly,

Woodson T. Wood

Citizens for Decent Literature

DEDICATED TO DECENCY IN THE MASS MEDIA

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Bishop, Fort Wayne-South Bend
Mrs. Dolly S. Scotford, President
National Council of Women
Church of Jesus Christ of Latter Day Saints
Most Rev. Vincent S. Waters
Bishop of Raleigh, N. C.
Rt. Rev. Msgr. Nicholas H. Wegner
Director, Boys' Town, Nebraska

Reply To:
1811 Provident Tower
Cincinnati, OH 45202
October 30, 1971

The Honorable Woodson T. Wood
Commonwealth Attorney
19th Judicial District
Maysville, KY

Dear Mr. Wood:

In reply to your letter, I have instructed CDL attorneys Bertsch and Clancy to supply brief material or to write a brief, as you wish. Please call Dick Bertsch (216--696-1433) collect and give him as much detail as possible.

If you wish, I will appear as an expert witness.

We are also willing, at strategic points, to send CDL attorneys to you for direct assistance.

I am personally delighted you "hit" Carnal Knowledge. Our time is limited, but we will help.

Keep us posted and give us as much lead time as possible.

Sincerely,

CITIZENS for DECENT LITERATURE, Inc.

BY:_____

Charles H Keating, Jr.

ml
Enclosure--CHK Dissenting Report to
Presidential Commission

WOODSON T. WOOD
COMMONWEALTH ATTORNEY
19TH JUDICIAL DISTRICT
MAYSVILLE, KENTUCKY

March 7, 1973

Mr. Keating
Keating, Muething, & Klekamp
18th Floor, Provident Tower
Cincinnati, Ohio 45202

Re: Commonwealth Attorney, ex rel Woodson T. Wood, Prosecuting Attorney of Maysville, Kentucky
vs.
A Motion Picture "Carnal Knowledge", et al.

Dear Mr. Keating:

The above-styled action to abate "Carnal Knowledge" as a nuisance was filed in Mason Circuit Court as Civil Action No. 2917 on November 19, 1971. You will recall that there were several non-resident defendants, and we have thus far been unable to obtain service of process on any of the defendants except Countrywide Theatres, Inc., a New York corporation with registered process agent in Kentucky, and Kenneth Neal, Manager of the local theatre.

You will recall that I proceeded by criminal information against Countrywide Theatres, Inc. and Kenneth Neal under the Kentucky obscenity statute. I have agreed to accept a fine of $400.00 on a plea of nolo contendre to conclude the criminal matter.

Since the civil action was filed, Countrywide Theatres has ceased to lease the local theatre and the new lessee has not exhibited any undesirable films.

In view of the facts that the criminal matter is disposed of, that we have been unable to obtain personal jurisdiction of most of the civil defendants, that Mason Circuit Court has a local rule for dismissing civil actions in which no steps have been taken for six months, that Countrywide

is no longer operating in Mason County, and that "Carnal Knowledge" appears now to be a dead issue, we believe it would not be wise to push the civil proceedings further.

Counsel for the defense have been requesting me to voluntarily dismiss the civil action, and I am sure they will ask the Court to impose the local rule mentioned above sometime this month. However, in deference to your preparation of and interest in the suit initially, I have advised defense counsel that I would first request your consent to dismissal. Please advise as soon as possible.

Yours truly,

Woodson T. Wood

WTW:cb

APPENDIX D

Contract for special legal services entered into on Oct. 1, 1970, between Board of Commissioners of Fulton County, Georgia (Atlanta) and law firm of Keating, Clancy, Bertson and Johnston ..... Page 3-4

GEORGIA

FULTON COUNTY

WHEREAS, Fulton County has determined the necessity for conducting a program against the disseminators of obscenity in this county; and

WHEREAS, there is no person presently employed by Fulton County or associated therewith, who is technically trained and qualified by experience to undertake the work necessary to combat the wave of obscene materials confronting our youth; and

WHEREAS, the firm of Keating, Clancy, Bertsch and Johnston, 440 Leader Building, Cleveland, Ohio, is known to have on its staff qualified lawyers, experienced and capable of rendering service in a program by which cases for prosecution on charges involving pornography and obscene literature are to be prepared and presented;

NOW, THEREFORE, in consideration of the premises and of the benefits to the public, and to the welfare of citizens of Fulton County, it is agreed:

1.

The Firm will undertake the work of investigation, preparation and prosecution of cases dealing with pornography in Fulton County, under the general supervision of Mr. Hinson McAuliffe, Solicitor General, Criminal Court of Fulton County.

2.

The Firm will be compensated at the rate of One thousand two hundred ($1,200.00) Dollars per month, at the end of each month; said services to continue for an indefinite period and until terminated by either party upon notice to the other.

3.

The Firm will not be entitled to any compensation or allowance as fringe benefit other than set forth herein.

4.

It is agreed that no member of the staff of Keating, Clancy, Bertsch and Johnston will have any civil service status, pension, or insurance benefits, or tenure of any kind as an officer or employee of the County.

IN WITNESS WHEREOF, the parties have hereunto set their hands and affixed their seals, this 1st day of October, 1970.

FULTON COUNTY

By: _____ (SEAL)
Chairman, Board of Commissioners

KEATING, CLANCY, BERTSCH AND JOHNSTON

By: _____ (SEAL)

APPROVED AS TO FORM:

_____
Fulton County Attorney

APPROVED AS TO CONTENT:

_____
Solicitor General,
Criminal Court of Fulton County

APPENDIX E

Page

Georgia Code Ann. Chapter 26-21.
Distributing Obscene Materials 3-6

years of age or older. No attempt has been made to change the former law with respect to liability of persons under the age of 14.

CHAPTER 26-21. DISTRIBUTING OBSCENE MATERIALS

Sec.
26-2101 Distributing obscene materials
26-2102 Distributing material depicting nudity or sexual conduct
26-2103 Use of premises in violation of Chapter
26-2104 Obscene materials declared contraband
26-2105 Plays, night club acts, motion pictures, television productions or other exhibitions
26-2106 Severability provision

Cross-reference
Tax on obscene materials, See Chapter 92-21A.

26-2101 Distributing obscene materials

(a) A person commits the offense of distributing obscene materials when he sells, lends, rents, leases, gives, advertises, publishes, exhibits or otherwise disseminates to any person any obscene material of any description, knowing the obscene nature thereof, or who offers to do so, or who possesses such material with the intent so to do: Provided, that the word "knowing" as used herein shall be deemed to be either actual or constructive knowledge of the obscene contents of the subject-matter; and a person has constructive knowledge of the obscene contents if he has knowledge of facts which would put a reasonable and prudent man on notice as to the suspect nature of the material.

(b) Material is obscene if considered as a whole, applying community standards, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and utterly without redeeming social value and if, in addition, it goes substantially beyond customary limits of candor in describing or representing such matters. Undeveloped photographs, molds, printing plates and the like shall be deemed obscene notwithstanding that processing or other acts may be required to make the obscenity patent or to disseminate it.

(c) Material, not otherwise obscene, may be obscene under this section if the distribution thereof, deemed or the offer to do so, or the possession with the intent to do so is a commercial exploitation of erotica solely for the sake of their prurient appeal.

(d) A person convicted of distributing obscene material shall for the first offense be punished as for a misdemeanor, and for any subsequent offense shall be punished by imprisonment for not less than one nor more than five years, or by a fine not to exceed $5,000, or both.

(Acts 1968, pp. 1249, 1302; 1971, p. 344.)

Cross-reference
Distribution of obscene materials to minors, see §§ 26-9901a through 26-9907a. Cases decided under former law, see Appendix, §§ 26-6301, 26-6301.1.

Editorial Note
Op. Atty. Gen., 69-351, states that House Bill 61, 1969 session (Acts 1969, p. 222) defines new and separate offenses relative to making available to minors obscene materials and

neither repeals Ga. Code Ann., Ch. 26-21, Criminal Code of Georgia, as amended, nor amends Ga. Code Ann., Ch. 26-63 (1933) as amended. See § 26-9901a et seq.

Acts 1971, p. 344, added the proviso to subsection (a). The Act stated that "section 26-2601" was being amended, but they obviously intended to refer to this section.

ANNOTATIONS

Adversary hearing

There is no necessity for adversary hearing on question of obscenity of publications prior to institution of criminal action against distributor, where publications have been obtained by prosecuting officers by purchase and no seizure of publications is required for evidence. 266/471 (175 S. E. 2d 539).

Where judge signed ex-parte order requiring defendants to show cause before him at time ranging from one to three days thereafter why motion picture should not be declared obscene, defendants contended ex-parte order operated as prior restraint and hearing was not adversary in nature: Held: ex-parte orders issued did not operate as prior restraints on showing of films but were merely proper exercise by court of its power to preserve its jurisdiction over subject-matter of litigation until hearings could be had. 227/676 (182 S. E. 2d 464).

Trial judge's ruling that there is probable cause to believe motion picture "Sandra—The Making of a Woman" is obscene is amply supported by evidence. Procedure employed in adversary hearing, resulting in preliminary injunction against exhibiting film, was proper and violated no rights guaranteed appellants by First and 14th Amendments to Federal Constitution. 228 Ga. 102 (184 S. E. 2d 144).

Constitutionality

This section is not violative of First and Fourteenth Admendments of United States Constitution on ground of vagueness. 227/46, 47 (1) (178 S. E. 2d 894).

This section is not violative of First, Fourth, Fifth, Ninth and Fourteenth Amendments of United States Constitution on ground that constitutional right to mere possession of obscene material necessarily implies right to purchase such material and, hence, right of others, including appellant, to distribute it. Id. 47 (2).

This section prohibiting distribution of obscene materials held constitutional and within purview of First and Fourteenth Amendments to U. S. Constitution. 309 F. Supp. 998.

Evidence

Jury was correctly charged as to statutory definition of obscene material, as contained in § 26-2101 (b, c). Their finding, that material comes within such statutory definition, is authorized by evidence, which supports their verdict of guilty. 227/46, 47 (4) (178 S. E. 2d 894).

Magazine with 40 pages of photographs of various sex acts and eight pages of pornographic articles held obscene. 336 F. Supp. 1372.

Irreparable damage

Alleged violator of obscenity statutes was not entitled to have complaint considered on merits in action to enjoin State prosecutions and for declaratory judgment that laws were invalid in absence of allegations of bad faith or harassment or other irreparable damage. 439 F. (2d) 1406.

Motion pictures

Courts of this State are not estopped from finding film obscene because of holding by United States Court of Appeals, Second Circuit that same film is not obscene. 227/ 377 (188 S. E. 2d 712).

It is a crime to exhibit obscene film to public even though minors are not invited to view it. Id.

State has interest in welfare, peace, and good order of its citizens and communities, and may in proper case maintain action at instance of district attorney to enjoin existing or threatened nuisance, even though nuisance constitutes crime punishable under criminal laws. Id.

Pornography
Films involved in this case were hardcore pornography. Their commercial exhibition was not protected by first amendment, and trial court erred in refusing to enjoin their exhibition in theater where all adult persons willing to pay price were admitted. 228/343 (185 S. E. 2d 769).

26-2102 Distributing material depicting nudity or sexual conduct

(a) A person commits the offense of distributing material depicting nudity or sexual conduct when he sends unsolicited through the mail, or otherwise unsolicited causes to be delivered, material depicting nudity or sexual conduct to any person or residence or office unless there is imprinted upon the envelope or container of such material, in not less than eight point boldface type, the following notice:

"Notice—The material contained herein depicts nudity or sexual conduct. If the viewing of such material could be offensive to the addressee, this container should not be opened but returned to the sender."

(b) As used within this section "nudity" means the showing of the human male or female genitals, pubic area or buttocks with less than a full opaque covering, or the depiction of covered male genitals in a discernibly turgid state, and "sexual conduct" means acts of masturbation, homosexuality, sodomy, sexual intercourse, or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks or, if such person be female, breast.

(c) A person convicted of distributing material depicting nudity or sexual conduct shall be punished by imprisonment for not less than one nor more than three years, or by a fine not to exceed $10,000, or both.

(Acts 1970, p. 173.)

26-2103 Use of premises in violation of Chapter

The use of any premises in violation of any of the provisions of this Chapter shall constitute a public nuisance.

(Acts 1971, pp. 344, 345.)

26-2104 Obscene materials declared contraband.

Any materials declared to be obscene by the provisions of this Chapter and advertisements for such materials are hereby declared to be contraband.

(Acts 1971, pp. 344, 345.)

26-2105 Plays, night club acts, motion pictures, television productions or other exhibitions

(a) Every person who, during the course of a play, night club act, motion picture, television production or other exhibition, or mechanical reproduction of human conduct, engages in conduct which would be public indecency under section 26-2011 if performed in a public place, shall be guilty of participation in indecent exposure and upon conviction shall be punished as for a misdemeanor.

(b) Every person who procures, counsels or assists any person to engage in such conduct or who knowingly exhibits or procures, counsels or assists in the exhibition of a motion picture, television production or other mechanical reproduction containing such conduct shall be guilty of a misdemeanor.

(Acts 1971, pp. 344, 345.)

26-2106 Severability provision

If any provision of this Chapter or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of this Chapter which can be given effect without the invalid provision or application, and to this end the provisions of this Chapter are declared to be severable.

(Acts 1971, pp. 344, 346.)

COMMITTEE NOTES

CHAPTER 26-21

DISTRIBUTING OBSCENE MATERIALS

Section 26-2101 is essentially a restatement of the former law, passed by the General Assembly in 1963 (Acts 1963, p. 78). The 1963 Act filled a void created by the judicially declared unconstitutionality of former § 26-6301 (Acts 1956, p. 801). The Act of 1956 attempted to eliminate coverage of radio, television, moving pictures, or newspapers published primarily for the distribution of public news from the sanctions imposed thereunder. Simpson v. State, 218 Ga. 337, 127 S. E. 2d 907 (1962).

Very little modification has been made in the Act of 1963 by the Criminal Code. Terminology has been simplified. The purpose of the Criminal Code is to punish the distribution or exhibition of obscene materials no matter who is the disseminator or exhibitor. Thus, any medium of distribution or exhibition is covered by this section. (Compare City of Atlanta et al. v. Twentieth-Century Fox Corporation, et al., 219 Ga. 271, 133 S. E. 2d 12 (1963).) The punishment has been retained with but some minor modification: rather than treating a first offense or subsequent offenses as misdemeanors in the discretion of the jury, the offense is, under the new section, a misdemeanor the first time it is committed and upon subsequent offenses it is treated as a felony. The punishment limits have been broadened to include a fine either in the alternative or in conjunction with the imprisonment.

CHAPTER 26-22. TREASON AND RELATED OFFENSES

Sec.

26-2201 Treason
26-2202 Insurrection
26-2203 Inciting to insurrection
26-2204 Advocating overthrow of government

APPENDIX F

CDL Model Obscenity Statute
(Revised 3-1-69)

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MODEL OBSCENITY STATUTE AND COMMENTS THEREON

Section 1. DEFINITIONS. As used in this Act:

(a) A thing is "obscene" if, by contemporary community standards, and considered as a whole, its predominant appeal is to prurient interest. As a matter of state public policy, obscenity is utterly without redeeming social importance and constitutes a public nuisance which should be abated.

(b) "Prurient interest" is defined as a shameful or morbid interest in nudity, sex or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters. If it appears from the character of the material or the circumstances of its dissemination that the subject matter is designed for, or directed to a specially susceptible audience, the subject matter shall be judged with reference to such audience. For the purpose of Section 7 of this Act, when the subject matter is distributed or exhibited to minors under 18 years of age, the subject matter shall be judged with reference to an average person in the community of the actual age of the minor to whom such material is distributed, or exhibited. In all other cases, the subject matter shall be judged with reference to the average person in the community.

(c) "Matter" means any book, magazine, newspaper, or other printed or written material or any picture, drawing, photograph, motion picture, play, night club performance, television production, or other pictorial representation, or any statue or other figure, or any recording, transcription or mechanical, chemical or electrical reproduction or any other articles, equipment, machines or materials.

(d) "Person" means any individual, partnership, firm, association, corporation or other legal entity.

(e) "Distribute" means to transfer possession of, whether with or without consideration, by any means.

(f) "Knowingly" means having actual or constructive knowledge of the obscene contents of the subject matter. A person has constructive knowledge of the obscene contents, if he has knowledge of facts which would put a reasonable and prudent man on notice as to the suspect nature of the material, and the failure to inspect the contents is either for the purpose of avoiding such disclosure or is due to reckless conduct.

(l) "Reckless conduct" is conduct which consciously disregards a substantial and unjustifiable risk that matter may be obscene. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that an average law-abiding person would observe

in the actor's situation under like circumstances.

Section 2. AFFIRMATIVE DEFENSE. This Act shall not apply to persons who may possess or distribute obscene matter or participate in conduct otherwise proscribed by this Act when such possession, distribution or conduct occurs in the course of law enforcement activities, or in the course of bona fide scientific, educational, or comparable research or study, or like circumstances of justification. If this issue is not presented by the prosecution's evidence, the defendant may raise the same as an affirmative defense by presenting some evidence thereon. Where raised, the prosecution must sustain the burden of proving the defendant guilty beyond a reasonable doubt as to that issue.

Section 3. JURY TRIAL. Criminal prosecutions and other proceedings involving the ultimate issue of obscenity (as distinguishe from the issue of "probable cause") shall be tried by jury, unless both parties to the action waive a jury trial in writing or by statement in open court, entered in the minutes, with the approval of the court.

Section 4. FUNCTION OF JURY AND COURT IN OBSCENITY TRIAL.

(a) The jury represents a cross section of the community and has a special aptitude for expressing the view of the average perso As the trier of fact, it is the exclusive judge of the common conscience of the community and the embodiment of community standards.

(b) Where a jury question is presented, i.e., that reasonable men may differ whether the subject matter or conduct is obscene, th trial court shall have no power either before, during, or after tri to dismiss an obscenity proceedings on the ground that the subject matter, or conduct, is not obscene as a matter of law; nor may an appellate court after trial set aside an obscenity verdict on the same grounds if an examination of the evidence indicates the verdic is supported by sufficient evidence.

(c) Any dismissal by the trial court on such grounds is appe able by the people.

Section 5. PRESUMPTION. Every person is presumed to have knowledge of the standards that exist in the community and what th jury or trier of fact may declare to be obscene.

Section 6. GENERAL SALE OR DISTRIBUTION, ETC., OF OBSCENE MA PENALTY. Every person who knowingly: sends or causes to be sent, brings or causes to be brought, into this State for sale or distri tion or exhibition; or in this State either (1) prepares, publishes prints, exhibits, distributes, or offers to distribute; or (2) has in his possession with intent to distribute or to exhibit or offer to distribute; any obscene matter is guilty of a misdemeanor.

Section 7. DISTRIBUTION OF OBSCENE MATTER TO MINOR; PENALTY. Every person, who with knowledge that a person is a minor under 18 years of age, or who, while in possession of such facts that he

should reasonably know that such person is a minor under 18 years of age, knowingly sends or causes to be sent, exhibits, distributes, or offers to distribute any obscene matter to a minor under 18 years of age, is guilty of a misdemeanor.

Section 8. HIRING, EMPLOYING, ETC., MINOR TO ENGAGE IN ACTS DESCRIBED IN SECTION 4; PENALTY. Every person who, with knowledge that a person is a minor under 18 years of age, or who, while in possession of such facts that he should reasonably know that such person is a minor under 18 years of age, hires, employs, or uses such minor to do or assist in doing any of the acts described in Sections 6 or 7, is guilty of a misdemeanor.

Section 9. ADVERTISEMENT, PROMOTION OF SALE, ETC., OF MATTER REPRESENTED TO BE OBSCENE; PENALTY. Every person who writes, creates, or solicits the publication or distribution of advertising or other promotional material for, or who otherwise advertises or promotes the sale, distribution, or exhibition of matter represented or held out by him to be obscene, whether or not such matter exists in fact, or is obscene, is guilty of a misdemeanor.

Section 10. PARTICIPATION IN LEWD EXPOSURE OR SIMULATED ACTS OF SEXUAL INTERCOURSE OR PERVERSION AS A PART OF A PLAY, ETC.

(a) Every person who, during the course of a play, night club act, motion picture, television production, or other exhibition, or mechanical reproduction of human conduct, engages in any lewd exposure or simulated act of sexual intercourse or perversion, which if engaged in offstage or offscreen and in public, would be subject to prosecution under Section ____ of the Penal Code as the misdemeanor crime of lewd exposure or exhibition, or under Section ___ of the Penal Code as the felonious crime against nature, or under Section ___ of the Penal Code as the felonious crime of sexual perversion, is guilty of a misdemeanor.

(b) Every person who procures, counsels, or assists any person to engage in such conduct, or who knowingly exhibits, or procures, counsels or assists in the exhibition of a motion picture, television production or other mechanical reproduction containing such conduct is guilty of a misdemeanor.

Section 11. SINGING OBSCENE SONG, BALLAD, ETC.; PENALTY.

(a) Every person who sings or speaks any obscene song, ballad, or other words in any play, night club act, motion picture, television production, or other exhibition or medium reproducing human conduct, or in any public place, is guilty of a misdemeanor.

(b) Every person who procures, counsels, or assists any person to engage in such conduct, or who knowingly exhibits, or procures, counsels, or assists in the exhibition of a motion picture, television production, or other mechanical reproduction containing such conduct, is guilty of a misdemeanor.

Section 12. REQUIRING PURCHASER OR CONSIGNEE TO RECEIVE OBSCENE MATTER AS CONDITION TO SALE, ETC.; PENALTY. Every person, who, knowingly, as a condition to a sale, allocation, consignment, or delivery for resale of any paper, magazine, book, periodical, publication or other merchandise, requires that the purchaser or consignee receive any matter reasonably believed by the purchaser or consignee to be obscene, or who denies or threatens to deny a franchise, revokes or threatens to revoke, or imposes any penalty, financial or otherwise, by reason of the failure of any person to accept such matter, or by reason of the return of such matter, is guilty of a misdemeanor.

Section 13. CONSPIRACY. A conspiracy of two or more persons to commit any of the crimes proscribed by this Act is punishable as a felony. Any court having jurisdiction of the conspiracy crime has concurrent jurisdiction to try all misdemeanor crimes committed in furtherance of the conspiracy.

Section 14. SPECIAL VERDICT. At the trial of any action arising hereunder, the jury shall render a special verdict, or, if jury trial be waived, the court shall enter special findings, on the issue of obscenity, in addition to a general verdict or general findings. The special verdict or findings on the issue of obscenity shall be: "We find (the court finds) the _____ (title or description of matter) to be obscene," or, "We find (the court finds) the _____ (title or description of matter) not to be obscene," as each item is or is not found obscene. A special verdict shall not be admissible as evidence in any other proceeding, nor shall it be res judicata of any question in any other proceeding.

Section 15. PUNISHMENT.

(a) Every person who violates Sections 6 or 9 is punishable by a fine of not more than one thousand dollars ($1,000) plus five dollars ($5) for each additional unit of material coming within the provisions of this Act, which is involved in the offense, not to exceed ten thousand dollars ($10,000), or by imprisonment in the county jail for not more than six months plus one day for each additional unit of material coming within the provisions of this chapter, and which is involved in the offense, such basic maximum and additional days not to exceed 360 days in the county jail, or by both such fine and imprisonment. If such person has previously been convicted of a violation of this Act, a violation of Section 6 or Section 9 is punishable as a felony and by a fine of not more than two thousand dollars ($2,000) plus five dollars ($5) for each additional unit of material coming within the provisions of this Act, which is involved in the offense, not to exceed twenty-five thousand dollars ($25,000) or by imprisonment in the State prison for not exceeding five years or by both such fine and such imprisonment.

(b) Every person who violates Sections 7, 8, 10, 11, or 12, is punishable by a fine of not more than two thousand dollars ($2,000) or by imprisonment in the county jail for not more than one year, or by both such fine and such imprisonment. If such person has been previously convicted of a violation of this Act, a violation of Sections 7, 8, 10, 11, or 12, is punishable as a felony and by a fine

of not more than five thousand dollars ($5,000), or by imprisonment in the State prison not exceeding five years, or by both such fine and imprisonment.

(c) Every person who violates Section 13 is punishable by a fine of not more than five thousand dollars ($5,000), or by imprisonment in the State prison not exceeding five years, or by both such fine and imprisonment.

Section 16. SEIZURE OF OBSCENE MATTER AUTHORIZED. Every person who is authorized to arrest any person for a violation of this Act is equally authorized to seize any obscene matter found in the possession or under the control of the person so arrested and to deliver the same to the court before whom the person so arrested is required to be taken.

Section 17. PROBABLE CAUSE FOR SEIZURE TO BE SUMMARILY DETERMINED.

(a) If the seizure be controverted by any interested person, the court to whom any obscene matter is delivered pursuant to the foregoing section or to the return of a search warrant must within one day after service upon the prosecuting attorney of a motion to suppress the evidence and/or restore the matter, proceed to take testimony in relation thereto. A decision as to whether there is probable cause to believe the seized material to be obscene shall be rendered by the court within two days of the conclusion of the restoration proceedings.

(b) If the motion to suppress the evidence is granted on the grounds of an unlawful seizure, the property shall be restored unless it is subject to confiscation as contraband, as provided for in Section 18, in which case it shall not be returned.

Section 18. CONTRABAND. DESTRUCTION OF OBSCENE MATTER OR ADVERTISEMENT OF MATTER REPRESENTED TO BE OBSCENE.

(a) Obscene matter and advertisements for matter represented to be obscene are contraband and shall be destroyed.

(b) Upon the conviction of the accused or rendition of a court order declaring such matter to be contraband and subject to confiscation, the court shall, when such judgments become final, order, upon five days' notice to the defendant, any matter or advertisement, in respect whereof the accused stands convicted, and which remains in the possession or under the control of the District Attorney or any law enforcement agency, to be destroyed, and the court shall cause to be destroyed any such material in its possession or under its control, retaining only such copies as are necessary for law enforcement purposes.

Section 19. PREPARING, ETC., OBSCENE MATTER OR ADVERTISING ELSEWHERE FOR SALE OR DISTRIBUTION IN THIS STATE. EXTRADITION. Every person, whether or not he is a citizen of or present in this

State, who knowingly prepares, publishes, or prints obscene matter for sale or distribution in this State, or who knowingly sends or causes to be sent, or brings or causes to be brought by any means into this State for sale or distribution herein, any obscene matter or any advertising promoting the sale or distribution of matter represented or held out to be obscene, whether or not such matter exists in fact or is obscene, shall be subject to the penalties of this Act, and the executive authority of this State shall demand extradition of such person from the executive authority of the State in which such person is found.

Section 20. POLICY. The several sheriffs, constables, state attorneys, county solicitors, and county prosecuting attorneys (or sheriffs, police chiefs, district attorneys, city attorneys, city prosecutors, and all law enforcement officials) shall vigorously enforce these sections within their respective jurisdictions.

Section 21. POLICY (LOCAL CONTROL). It is not the intent of this Act to occupy the field in the regulation of obscenity, and counties, cities and other political subdivisions of this State are hereby specifically given the right to further regulate obscene materials and conduct.

Section 22. SEVERABILITY. If any provision hereof or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are declared to be severable.

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APPENDIX G

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Comments on Model Obscenity Statute
(Revised 3-1-69) 3-16

COMMENTS ON THE MODEL OBSCENITY STATUTE

The CDL model statute is patterned after the American Law Institute Model Penal Code drafts. Both employ the "variable" approach to obscenity. Several state legislatures have already adopted this "variable" approach to obscenity. See South Dakota Section Laws of 1968, Chapter 29, Sections 1-16, approved February 15, 1968; New York Penal Laws, Article 235.00-235.22, effective September 1, 1967; Illinois Annotated Statutes, Smith-Hurd, Vol. 28, Sections 11-20; General Statutes of North Carolina, Volume 1-B, Section 14-189.1, and an Act of the South Carolina General Assembly, approved May 12, 1965. Other states have partially adopted its tenets by judicial interpretation: Conn. v. Sul, 146 Conn. 78, 147 At1.2d 686, 691 (1958); State v. Jackson, 224 Or. 337, 356 P2d 495, 507 (1960). The United States Supreme Court has, in its majority opinions, repeatedly cited the Model Penal Code provisions with approval. See "Analysis of the Mishkin, Ginzburg, and Fanny Hill decisions", appearing in the National Decency Reporter, June-July 1966, at page 15, and CDL Commentaries on the Law of Obscenity, Volume 1, No. 3, pp. 2-15, and Sam Ginsberg v. N.Y., 20 L.Ed.2d 195 at fn. 4 (April 22, 1968).

Public Nuisance - Section 1(a)

Section 1(a) incorporates into statutory language the Common law concept that obscenity is a public nuisance. The merit to this approach lies in the resultant focusing on the public welfare issue and muting of the defense cry of "censorship".

In December of 1968, the District Attorney of Allegheny County (Pittsburgh, Pa.) utilized this concept in a successful Common Law action in equity to abate the motion picture film, "Theresa and Isabella" as a public nuisance. Comm. of Penn. v. Guild Theater. Similar actions have also been successful elsewhere.

"Utterly without redeeming social importance - Section 1(a)

The majority opinion in Roth-Alberts is clear that "utterly without redeeming social importance" is not a required test for factual obscenity. If it were, the judge in Roth v. U. S. would have been required to instruct the jury in that case to make a finding on that issue.

At page 484 of the Roth-Alberts opinion, Justice Brennan said, "Implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance." It seems clear from this language that the two terms are equivalent. Section 1(a) of the Model Obscenity Statute incorporates this understanding.

At least two State Supreme Courts have recently refused to follow the current bastardization of the Roth test which attempts to engraph "utterly without redeeming social importance" onto the Roth test as a third and separate test. Cain v. Comm. of Ky., Ky. ___ (Feb. 14, 1969), City of Blue Island, Ill. v. DeVilbiss, 242 N.E.2d 761 (Nov. 22, 1968).

Variable Obscenity: The Development of Its Acceptance in the United States Supreme Court

The philosophy behind the model legislation first appeared in the language of the modern Court's opinions in 1957 in the concurring opinion of Chief Justice Warren in Roth v. U.S., where he said:

> "It is not the book that is on trial; it is a person. The conduct of the defendant is the central issue, not the obscenity of a book or picture. The nature of the materials is, of course, relevant as an attribute of the defendant's conduct, but the materials are thus placed in context from which they draw color and character. A wholly different result might be reached in a different setting." Roth v. U.S., 354 U.S. 476, at 494. See also, Justice Warren's opinion in Kingsley Books, Inc. v. Brown, 354 U.S. 436, and Jacobellis v. Ohio, 378 U.S. 184 (1964).

An examination of the variable treatment afforded the subject matter emphasizes that it is the "act", not the subject matter which is important.

Nine years later, a majority of five justices adopted Warren's rationale in the Roth case and, in upholding variable obscenity as consistent with constitutional standards, applied its rationale in interpreting the federal postal obscenity statute. Ginzburg v. U.S., 383 U.S. 463, 475 (Mar. 21, 1966). Justice Harlan would have made it a majority of six, had the Ginzburg case not been a federal prosecution.

The "special audience" concept - that portion reading, "If it appears from the character of the material or the circumstances of its dissemination that the subject matter is designed for, or directed to a specially susceptible audience, the subject matter shall be judged with reference to such audience" - was given the approval of six justices in Mishkin v. U.S., 383 U.S. 502, dealing with bondage and flagellation materials and decided on the same day as Ginburg v. U.S., supra.

The minor's concept - that portion reading, "When the subject matter is distributed or exhibited to minors under 18 years of age,

the subject matter shall be judged with reference to an average person in the community of the actual age of the minor to whom such material is distributed or exhibited," as construed by the New York Court of Appeals in Bookcase v. Broderick, 18 N.Y.2d 71, (July 7, 1966) and People v. Tannenbaum, 18 N.Y.2d 268 - was upheld by a majority of five members in Sam Ginsberg v. U.S., ___ U.S. ___, 20 L.Ed.2d 195 (April 22, 1968).

Variable Obscenity: How It Functions

Under the "variable" obscenity approach, the term "obscene" as defined in Roth-Alberts functions in accordance with two variable factors: (1) The nature of the materials, and (2) the use of the materials, i.e., the manner in which they are employed.

Under "variable" obscenity, the most objectionable material imaginable (Variable Factor 1) would not be obscene when used by a proper audience (Variable Factor 2). See U.S. v. 31 Photographs, 156 F.Supp. 350 (DCSD NY 1957), cited for comparison in Ginzburg at page 40, fn. 15, involving the use by Kinsen scientists for research of what was conceded to be blatant pornography. Conversely, material of a less objectionable nature (Variable Factor 1) may be obscene when used improperly, i.e., for the sole purpose of pandering to the prurient interest (Variable Factor 2). See U.S. v. Rebhuhn, 109 F.2d 512 (2d Circuit 1940), cited with approval in Ginzburg at page 39 and page 40, fn. 15, where a book, "Sex Life In England" having a limited legitimate audience of anthropologists and psychotherapists was indiscriminately advertised and disseminated in the mail.

The above results are not startling, nor are they inconsistent with the majority decision in Roth. Quite the contrary, they draw into focus and clarify the Roth concepts which reject obscenity as "utterly without redeeming social importance" and equate obscenity with "pandering" to the prurient interest. In the former situation, the use of the material under the circumstances establishes the material as having "redeeming social importance", whereas in the latter situation, the "pandering" use establishes the material as "utterly without redeeming social importance." Pandering was defined by the Court in Ginzburg at page 36 as "the business of purveying textual or graphic matter openly advertised to appeal to the erotic interest of their customers."

Variable Obscenity: Proof

Such evidence may come from either the prosecution or the defense, depending upon who has the burden of going forward with the evidence, and bearing in mind that it is always the prosecutor's burden to establish the violation beyond a reasonable doubt. See Section 2 of the CDL Model Obscenity Statute entitled, "Affirmative Defense". This was graphically illustrated in the majority opinions in the Mishkin and Ginzburg cases.

In the "Housewife's Handbook on Selective Promiscuity" counts in Ginzburg, the United States Government, during its case in chief, presented evidence tending to establish indiscriminate mailings and Ginzburg's intent to pander. Such was sufficient to support the trial court judgment. Had Ginzburg wished to rely on the book's nonprurient appeal in the hands of a special audience of doctors, etc., it was his burden to introduce some evidence in order to overcome the people's prima facie case. Cf. U.S. v. 31 Photographs, etc., 156 F.Supp. 350, cited with approval in Ginzburg at fn. 15, where the trial judge acquitted members of the special audience when the purpose of the distribution was shown to be the social value rather than the prurient interest to the special audience of sociologists.

In Mishkin v. N.Y., the people introduced proof of the appeal of the material to a special audience during their case in chief, which supported the judgment on appeal.

Variable Obscenity: Sales to Minors

(a) Historical Background of the Term "Obscene to Minors".

Under the American Law Institute Model Penal Code Statute and Section 7 of the CDL Model Obscenity Statute, when a person makes a sale to a minor, knowing the purchaser to be a minor, or while in possession of such facts that he should reasonably know that such a person is a minor, then the obscenity is judged by the response of such minor to that material. The Reporter's Comments to American Law Institute Model Penal Code Section 207.10, at pages 36-38, provide:

> 9. Obscenity Judge by Ordinary Adults. Unless Addressed to Special Audience. A fundamental question in current obscenity law is whether obscenity is to be measured by the response of average or normal individuals or by that of any child or perverted adult to whose notice the material may come . . . .
>
> Subsection (a) of proposed Section 207.10 requires obscenity to be judged with reference to ordinary adults unless the material is designed for or directed to children or other specially susceptible audience . . . . (Our emphasis.)

Support authority for this proposition is U.S. v. Levine, 83 F. 156 (1936), and the opinion of the Circuit Court of Appeals, Second Circuit, written by Judge Learned Hand. Judge Learned Hand was one of the drafters of the Model Penal Code sections on Obscenity. The case dealt with a federal prosecution for sending an obscene circular through the mails. At page 157, Judge Hand said:

"What counts is its effect, not upon any particular class, but upon all those whom it is likely to reach. Thus, 'obscenity' is a function of many variables.

"The case was not tried on this theory; on the contrary the judge supposed that a book or picture was obscene of innocent by an absolute standard independent of its readers . . . . He was in error . . . ." (Our emphasis.)

And at page 158:

"It may appear that the prospective buyer in the eighth count was a youth and that the accused had reason to suppose that he was. The evil against which the statute is directed, would then be the possible injury to such a youthful reader. It is when the crime consists of importing the work, or offering it for general sale, that the test cannot be found in the interests of those to whom it is sent, though abnormally susceptible . . . ."

U.S. v. Levine was cited in the Roth case with approval at fn. 16 as an example of the modern test. See also its citation in Sam Ginsberg v. N.Y., 20 L.Ed.2d 195 at page 202, fn. 5.

Variable Obscenity: Sales to Minors
(b) "Harmful to Minors", as Used in Sam Ginsberg, Means "Obscene to Minors"

When Sam Ginsberg v. New York was handed down April 22, 1968, a blind legislative stampede was started in other states to incorporate into law the provisions of the Special New York Minor's Statute at issue in the Sam Ginsberg appeal. In our opinion a blind application of the language of that statute without more is unwise. If Sam Ginsberg is to be properly understood, one must consider the history of the New York statute and the results reached in the New York cases which tested the constitutionality of that provision.

The New York statute is not really a "Special Minor's Statute". It is a specific application of the variable obscenity concept as applied to distributions or exhibitions to minors. In reacting to the hard-core pornography rule (constant obscenity) which had evolved in the New York courts, the New York State Legislature in 1965 adopted two minor's statutes, Penal Law Sections 484(h) and 484(i). Although the drafters of those statutes employed the special language, "harmful to minors", the New York Court of Appeal

in upholding the constitutionality of such provision, construed the term to mean "obscene to minors". See People v. Charles Tannenbaum, 18 N.Y.2d 268, 274 N.Y.S.2d 131, wherein the New York Court of Appeals said:

> "In response to the deeply felt needs of the community, our State Legislature enacted . . . statutes . . . proscribing dissemination to infants under 17 . . . of materials obscene as to such infants. (Our emphasis.)
>
> "In Bookcase v. Broderick, 18 N.Y.2d 71, decided July 7, 1966, we upheld the Legislature's power to employ variable concepts of obscenity." (Our emphasis.)

It was this statute and this interpretation which was upheld by the United States Supreme Court in Sam Ginsberg v. N.Y., 20 L.Ed.2d 195 at 206.

If the law of obscenity is to remain coherent and intelligible, the language employed in the statute must remain rooted to establish historical concept. To illustrate, we need but cite two proposed adaptations of the "harmful to minors" statute. One proposed in Ohio created three crimes: "Obscene to adults," "harmful to minors", and "obscene to minors". To further complicate matters, in the case of the latter two crimes, different penalties were established for each crime. Another proposal in California defined "harmful matter to minors" to mean "that to the average person, applying contemporary standards, the predominant appeal of the matter, taken as a whole, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters, and is matter the redeeming social importance of which is substantially less than its prurient appeal." (Our emphasis.) The unsoundness of the latter language stems from the fact that as originally employed in Roth, it was held that a prurient interest was "utterly without redeeming social importance". The latter definition of "prurient interest" would contradict the Roth holding.

The CDL Model Obscenity Statute adopts the "obscene to minors" approach used in the American Law Institute Model Penal Code, which represents the distillation of the best of this Nation's obscenity laws, which laws were arrived at by such experienced jurists as Justices Learned Hand, Jerome, Frank, and Curtis Bok, etc.

The proscription of Section 7 only applies to distributions and exhibitions and not to "possession for sale", since possession of such material (i.e., obscene to minors under 18 but not to persons over 18) would be legal for sale to those over 18.

Under Section 7, knowledge of the minor's age is an element of the CDL Minor's Statute. See Sam Ginsberg v. N.Y., 20 L.Ed.2d 195.

206. It is doubtful that an absolute liability standard will succeed. See Commonwealth of Mass. v. Corey, 221 N.E.2d 222 (Nov. 3, 1966) involving the sale of the paperback book "Candy" to minors aged 15 and 17, and cf. New York Penal Law 484 (i), which required knowledge of the character of the material, but unlike Section 7 of the CDL Model Obscenity Statute and unlike Section 484 (h), did not require knowledge of the minor's age. New York Penal Code Law 484(i) was involved in N. Y. v. Tannenbaum, 18 N.Y.2d 268, 274 N.Y.S.2d 131, held to be moot in 18 L.Ed.2d 1300, and was held to be unconstitutionally vague in Rabeck v. N.Y., ___ U.S. ___, 20 L.Ed.2d 741, 88 Sup. Ct. ___ (May 27, 1968).

Variable Obscenity: Special Audience - Bondage, Flagellation, and Homosexual Material

The "special audience" proviso in the definition of obscenity is designed to take care of the bondage, flagellation, and homosexual problem.

In this case, prosecution would be brought under the general obscenity proscription. See Section 6. The people in their case in chief, can show by expert testimony that the material had a prurient effect on the special audience, and by testimony of vice officers and other experts that it was aimed at a special audience. See American Law Institute Model Penal Code (1957 draft), Section 207.10(2) and the Reporter's Comments thereon at pages 36-38; Proposed Official Draft, Model Penal Code (1962), and U.S. v. Levine, 83 F.2d 156. See also Harold Zucker v. N.Y., 15 A.D.2d 883, 225 N.Y.S.2d 154 (Mar. 6, 1962), cert. denied 371 U.S. 863, 83 S. Ct. 116, 9 L.Ed.2d 100 (Oct. 15, 1962); Louis Finkelstein v. N.Y., 11 N.Y.2d 300, 229 N.Y.S.2d 367, 183 N.E.2d 661 (May 17, 1962), cert. denied 371 U.S. 863, 83 S. Ct. 116, 9 L.Ed.2d 100 (Oct. 15, 1962); Edward Mishkin v. N.Y., 383 U.S. 502, 16 L.Ed.2d 56, 86 S.Ct. 958 (Mar. 21, 1966).

Scienter - Sections 1(f) and (2)

The scienter requirement came into the law through Justice Brennan's opinion in Smith v. Calif., 361 U.S. 147 (1959). That case held a strict liability penal ordinance to impose too severe a limitation on the public's access to constitutionally protected matter. The dictum in the Smith case seemed to establish, and most state courts so interpreted, the mens rea constitutional requirement as "an awareness of the nature of the contents". A complete discussion of the cases decided after Smith appeared in CDL Commentaries On the Law of Obscenity, Volume 1, No. 1, at pp. 53-95. See also Ginsberg v. N.Y., 20 L.Ed.2d 195 at 206.

In Mishkin v. N.Y. (supra), an argument was made that the state had the burden of proving that the defendant had "subjective" knowledge that the subject matter was obscene. A majority of six rejected this argument, holding that the New York statutory requirement, as

interpreted by New York's highest court, was equivalent to the "reckless" standard of the Model Penal Code test, which satisfied the constitutional standard. Approval of the "reckless" test - an objective standard - put to rest the argument that "subjective" knowledge was a constitutional requirement. See National Decency Reporter, June-July 1966, p. 9, et seq.; CDL Commentaries on the Law of Obscenity, Volume 1, No. 3, pp. 2-9, et seq.

The definition of "knowingly" under Section 1(f) of the CDL Model Obscenity Statute is aimed at keeping the prosecutor's burden of proof for a prima facie case at "knowledge of the contents".

The use of the affirmative defense will permit a defendant latitude in establishing, in his defense, that he was trading in the materials legitimately (i.e., was not pandering), once the prosecution has established that he knew or should have known of the contents.

Presumption - Section 5

The presumption in aid of the people's case, established by Section 5, is merely a restatement of the language of the United States Supreme Court in Roth-Alberts at fn. 28.

Jury Trial - Sections 3 and 4

Historically, the test for obscenity has been defined in terms of a jury question. See Judge Learned Hand's opinion in U. S. v. Levine, 83 F.2d 156, 157:

> "As so often happens, the problem is to find a passable compromise between opposing interests, whose relative importance, like that of all social or personal values is incommensurable. We impose such a duty upon a jury . . . because the standard they fix is likely to be an acceptable mesne, and because in such matters a mesne most nearly satisfies the moral demands of the community . . . . Thus, 'obscenity' is a function of many variables, and the verdict of the jury is not the conclusion of a syllogism of which they are to find only the minor premise, but really a small bit of legislation ad hoc, like the standaad of care." (Our emphasis.)

Some states guarantee the right of jury trial to both the people and the defendant. See Wisc. Statutes, Vol. 42, Section 957.01; Calif. Const. Art. 1, Sec. 7. In such a situation, the people are not deprived of a jury trial on the issue of "obscenity" where the defendant waives jury trial, unless the people join in the waiver. See 79 A.L.R. 563.

In other states, because of special statutes, the people do not have such a right in situations where the defendant waives jury. See State of Ohio v. Winters, 410 App. 146, 12 O.L.Abs. 164, 180 N.E. 559, where the court held it to be error to grant the state's request for a jury trial where the defendant had waived his right to jury trial.

Section 3, in requiring a jury trial unless waived by both parties, focuses attention on the special interest of the people in the value being determined - the common conscience of the community. Section 4 condifies the Common Law concept that the jury is the embodiment of community standards.

Recent cases which faithfully apply this principle are: Bissinoff v. Harper, 212 So.2d 666 (July 11, 1968), and Cain v. Comm. of Ky., ___ Ky. ____ (Feb. 14, 1969), where the Kentucky Court of Appeals said:

> "As we view this matter, it is not the function of this court or any other appellate court to determine whether the material shown is obscene. This is a factual determination to be made by a jury. The film was shown to the jury and they found it obscene. Our function as an appellate court is limited to determining whether the evidence in the record supports the findings of the jury. If so, the verdict must stand. This law is so basic and ancient to the principles of English and American jurisprudence as so elementary in its application as a principle of appellate procedure that we do not feel called upon to cite authorities for its support . . . ."

Because of the possible conflict with free speech, the determination of obscenity is often termed a mixed question of law and fact. For the proper functioning of the court and jury in this area, see the comment in CDL Commentaries on the Law of Obscenity, Volume 1, No. 3, at pp. 3-32, et seq., entitled, "Both The Court and The Jury Have a Proper Function."

Appeal on Matters of Law - Section 4(c)

Section 4(c) authorizes an appeal by the prosecution in cases where a lower court holds that the subject matter, which is the subject of the charge, is constitutionally protected. This follows the recommendations contained in Section 207.10(3) of the 1957 draft of the Model Penal Code. While in many jurisdictions this right of appeal exists at the present time, in at least one major jurisdiction, the district attorney has refused to appeal, under the claim that, procedurally, the avenue is not open to him.

Advertising Material To Be Obscene - Section 9

Section 9 makes it a misdemeanor to represent or hold out matter to be obscene, whether or not such matter is in fact obscene. This follows the recommendation of Section 207.10(6) of the 1957 Model Penal Code draft and Section 251.4(2)(a) of the Model Penal Code (1962).

The roots for the Model Penal Code proposal are found in principles expressed in several old federal cases which gained acceptance in the 3rd Circuit in the so-called Hornick rule. U.S. v. Hornick, 229 F.2d 120 (3rd Cir. 1956). An excellent discussion of this development appears in James Jackson Kilpatrick's book, "The Smut Peddlers" at pp. 71-77.

A similar provision appearing in California Penal Code Section 311.5 was tested and upheld as constitutional in Kirby v. Municipal Court of Newhall Judicial District, 46 Cal. Rptr. 844 (Sept. 30, 19

Lewd Exposures, Etc., As A Part Of A Play, Etc., - Sections 10 And 11

The communcations media is plagued at the present time with an avalanche of lewd displays and language which, if engaged in off stage or off screen and in public, would be subject to criminal penalties as improper public conduct. Sections 10 and 11 codify the rationale applied by the majority of the New York Court of Appeals in Trans Lux Distributing Corp., v. Board of Regents, 248 N.Y.S.2d 857 (Mar. 26, 1964), reversed on other grounds in Trans Lux Distributing Corp. v. Board of Regents, 380 U.S. 259 (Mar. 15, 1965). See also Justice Clark concurring in Kingsley International Pictures Corp. v. Regent, 360 U.S. 684 at 702.

It beggars logic to say that acts of sodomy or actual perversion are punishable as felonies and at the same time hold that a vivid full screen four minute pictorial display of a simulated act of oral intercourse (sodomy) performed by one teenage girl on another teenage girl ("Theresa and Isabella") or a full screened five minute pictorial display of a like lesbianic act ("The Killing of Sister George"), or similar screened conduct or play performance may not be reached by the law. As was voiced by Justice Burke in the Trans Lux case at page 861:

> "To all argument predicated on artistic merit as decisive of the constitutional question, it is sufficient answer to say that artists are not such favorites of the law that they may ply their craft in the teeth of a declared overriding public policy against pornographic displays."

These recent developments should even give Justices Douglas and

ck second thoughts. See Justice Douglas dissenting in
h at page 512:

"I assume there is nothing in the Constitution which permits Congress from using its power over the mails to proscribe conduct on the ground of good morals. No one would suggest that the First Amendment permits udity in public places, adultery, and other phases of sexual misconduct. . . ." (Our emphasis.)

Felony vs. Misdemeanor - Sections 14 and 15

Section 13 makes a conspiracy to violate the obscenity laws elony.

While the initial violation of Sections 6, 7, 8, 9, 10, 11 12 is a misdemeanor, under the provisions of Section 15, a second olation is treated as a felony.

Special Verdict In Criminal Trial
On Issue of Obscenity - Section 14

The procedure should be such as to permit the "obscenity" of subject matter involved in the case to be decisively decided. is may not be done in three situations:

1. Where there are multiple items involved in one count, e.g., one count charging possession of five publications, and the jury returns a general "guilty" verdict. Under such a verdict, the jury may have considered only one, or all five obscene.

2. Where the jury returns a general verdict of "not guilty" solely because they could not find the defendant had the requisite guilty mind - "scienter".

3. Where a search and seizure ruling makes prosecution of the criminal case impossible.

At the present time, it is essential that law enforcement be e to point with certainty to that specific material which was nd to be obscene as a level of reference and guide for future ion. If it is a girlie magazine, the name and number of the ition should be identifiable as the item which was declared to obscene, so that the community evaluation may be known and erstood by law enforcement officials in the same and other isdictions, and considered by them as a guide in their future ions.

There are many situations where a jury may be convinced that material is obscene but will not convict, because of the other

considerations involved in a criminal trial - the guilty mind (scienter) requirement. Examples are: The vendor who agrees to remove the material after arrest, but who is prosecuted anyway; the situation where a vendor is prosecuted for material which is similar to equally obnoxious material sold elsewhere; prosecution of the "little old lady" who is able to convince the jury she had not been adequately warned, etc.

The above defects may be corrected by the addition of a provision which requires the return of a special verdict on the issue of "obscenity" in addition to the return of the general verdict.

In praise of special verdicts, Sunderland says in 29 Yale L. J. 253, 259:

> "The special verdict compels detailed consideration, but above all it enables the public, the parties and the court to see what the jury has done . . . . The general verdict is either all wrong or all right, because it is an inseparable and inscrutable unit. A single error completely destroys it. But the special verdict enables errors to be localized so that the sound portions of the verdict may be saved . . . ."

The special verdict of Section 14 has been made inadmissible as evidence in other proceedings, in recognition of the fact that "use" is a variable factor under variable obscenity concepts (supra). The "conduct" is not always the same in every case, hence the findings shall be restricted to the conduct involved in the case which was tried. See National Decency Reporter, June - July, 1966, at page 7, para. 5.

Penalty - Section 15

The graduated penalty of Section 15 is specifically aimed at the manufacturer and distributor. The small retailer does not suffer as much as the area distributor. Any large scale distributor will distribute as many as 2,000 copies of a salacious paperback book. Under intelligent use of this penalty provision, a penalty of major proportions (up to $10,000) can be imposed upon the really culpable operator. This section is modeled after Section 311.9 of the California Penal Code.

Seizure and Summary Determination - Sections 16 and 17

Section 16 specifically authorizes the arresting officer, at the time of an arrest, to seize material reasonably thought by him

to be obscene. Section 17 establishes procedures which provide the due process safeguards required in such cases by Kingsley Books, Inc. v. Brown, 354 U.S. 436, 77 S.Ct. 1325, 1 L.Ed.2d 1469 (June 24, 1957), and Freedman v. Maryland, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (Mar. 1, 1965).

Both provisions are necessary to counter the claim being made by defense attorneys that arresting officers have no right to seize without a prior judicial determination. See Flack v. Municipal Court of Anaheim-Fullerton Judicial District, 56 Cal. Rptr. 162, 165 (Jan. 20, 1967), where the California Court of Appeal, Fourth District, rejected such claim, saying:

> "No citation of authority seems necessary for the proposition that probable cause need not be previously determined in each instance by a judicial officer before a police officer can make a lawful arrest accompanied by seizure for that which would appear to 'the reasonable man' to be a crime involving contraband. Police officers cannot be relegated to a classification wherein their judgment would not meet the test enunciated in Roth v. United States . . . ."

A majority of the ultra-liberal California Supreme Court had a different view however. See Flack v. Municipal Court, 59 Cal. Rptr. 872 (July 3, 1967) reversing the Court of Appeal.

Nor did Philadelphia County law enforcement officers fare any better in the Pennsylvania courts, in a case involving an arrest and the seizure of the motion picture film, "Olga's House of Shame". Smith v. Crumlish, 218 Atl.2d 596 (Apr. 14, 1966). In returning the film, Common Pleas Judge Chudoff said that Sections 528 and 529 of the Pennsylvania laws "do not provide any special procedure for the search and seizure of the films." He said he was leaving the solution of the problem to the State Legislature.

Recently the federal courts have intruded upon the scene with startling results. In Cambist Films, Inc. v. Illinois, 292 F.Supp. 185 (Oct. 21, 1968), not only did 7th Circuit Federal District Judge Hubert L. Will hold the seizure of the sex exploitation film "Aroused" to be illegal, but he also took it upon himself to hold the film not to be obscene. His opinion cited Metzger v. Illinois (June 19, 1968), wherein another Federal District Judge of that Circuit came by a like result as to the motion picture film "I A Woman" - a film which a Louisville jury held obscene and whose verdict the Kentucky Court of Appeals ruled to be supported by overwhelming evidence. Cain v. Comm. of Ky., ___ Ky.___ (Feb. 14, 1969). A different result was reached by another Federal District

Judge in the same Circuit in Metzger v. Pearcy, 393 F.2d 202, (April 29, 1968), which ordered the film "I A Woman" returned to its owner, but also ordered its return for use at the criminal trial in Indianapolis. A 3-judge constitutional court in the Eastern District of Kentucky also ordered the motion picture film "The Female" returned, but refused to enjoin prosecution, holding the film to be obscene. Cambist Films, Inc. v. Tribell, 293 F.Supp. 407 (Nov. 26, 1968). As to this new federal policy of narrowly limiting the policy of abstention, cf. Dale Book Co. v. Leary, 233 F.Supp. 754, aff'd in 389 F.2d 40 (Jan. 2, 1968).

Sections 16 and 17 provide the solution to the above problems. By specifically authorizing a seizure incident to an arrest or in execution of a search warrant (obtained from a magistrate in an exparte proceedings) and, at the same time establishing a procedure which makes possible an immediate adversary hearing after the seizure, the same meets the due process requirement of Kingsley Books, Inc. v. Brown, supra. See Holden v. Arnebergh, 71 Cal. Rptr. 401 (Aug. 21, 1968) wherein the Los Angeles police employed such procedure and the California courts afforded such remedies. Motion to dismiss on the part of the City granted on March 3, 1969, the United States Supreme Court opinion reading:

> "Per Curiam. The motion to dismiss is granted and the appeal is dismissed, it appearing that the judgment below rests upon an adequate state ground."

In the case of the use of search warrants however, be sure to avoid the pitfalls described in Lee Arts Theater v. Va., 20 L. Ed.2d 1313 (June 19, 1968).

Contraband - Sections 17(b) and 18

Section 18 adopts the legislative device employed in the Wisconsin jurisdiction and recently upheld by the Wisconsin Supreme Court in Misc. v. Voshart, 159 N.W.2d 1 (June 7, 1968).

Extradition - Section 19

Section 19 adopts the legislative policy mandated by the Indiana Legislature. It is the public policy of that state to use the extradition laws to bring to justice the prime movers in the industry who operate abroad under the protection of more tolerant law enforcement attorneys.

Local Control - Section 21

Section 21 contains a grant of local control to the political subdivisions to further regulate in the area of obscene control.

APPENDIX H

Page

Copy of Senate Bill 108, as originally filed in Georgia State Senate (obtained from Archives Building of Georgia State Archives)..... 3-13

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SENATE BILL 108

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By: Senators Garrard of the 37th and Walling of the 42nd

A BILL TO BE ENTITLED

AN ACT

To amend Code Chapter 26-21, relating to distributing obscene matter, as amended, by an Act approved March 10, 1970 (Ga. Laws 1970, p. 173), so as to provide that every person who knowingly sends or causes to be sent, or brings or causes to be brought, in the State for sale or distribution or exhibition, or prepares, publishes, prints, exhibits, distributes or offers to distribute, or has in his possession with intent to distribute or to exhibit or offer to distribute, any obscene matter shall be guilty of a felony; to provide that every person, who with knowledge that a person is a minor under 18 years of age, or who, while in possession of such facts that he should reasonably know that such person is a minor under 18 years of age, knowingly sends or causes to be sent, exhibits, distributes, or offers to distribute any obscene matter to a minor under 18 years of age, is guilty of a felony; to provide that every person who, with knowledge that a person is a minor under 18 years of age, or who, while in possession of such facts that he should reasonably know that such person is a minor under 18 years of age, hires, employs, or uses such minor to do or assist in doing any of the acts herein described is guilty of a felony; to prohibit the writing, creation, solicitation, publication or distribution of certain advertising or promotional material and punish same as for a felony; to prohibit lewd exposure or simulated acts of sexual intercourse or perversion under certain circumstances to be punished as for a felony; to prohibit the procuring, counseling or assisting of any person to engage in certain conduct and to punish same as for

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felony; to prohibit the speaking or singing of any obscene song, ballad or other words under certain circumstances and to punish same as for a felony; to prohibit certain activities which, in effect, require a purchaser or consignee to receive obscene matter as a condition to sell and to punish same as for a felony; to provide for seizure; to provide for destruction of contraband; to provide for preparation of obscene matter or advertising for distribution in this State; to provide for enforcement of this Chapter; to provide for severability; to provide for affirmative defenses; to provide for a jury trial; to provide for the function of the jury and court; to provide for presumptions; to repeal a specific law; to repeal conflicting laws; and for other purposes.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF GEORGIA:

Section 1. Code Chapter 26-21, relating to distributing obscene matter, as amended, by an Act approved March 18, 1970 (Ga. Laws 1970, p. 173), is hereby amended by striking said Code Chapter in its entirety and by inserting in lieu thereof a new Code Chapter 26-21, which shall read as follows:

"CHAPTER 26-21. OBSCENE MATTER.

26-2101. DEFINITIONS. As used in this Chapter:

(a) A thing is 'obscene' if, by contemporary community standards, and considered as a whole, its predominant appeal is to prurient interest. As a matter of State public policy, obscenity is utterly without redeeming social importance and constitutes a public nuisance which should be abated.

(b) 'Prurient interest' is defined as a shameful or morbid interest in nudity, sex or excretion, which

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goes substantially beyond customary limits of candor in description or representation of such matters. If it appears from the character of the material or the circumstances of its dissemination that the subject matter is designed for, or directed to a specially susceptible audience, the subject matter shall be judged with reference to such audience. For the purpose of 26-2107 of this Chapter, when the subject matter is distributed or exhibited to minors under 18 years of age, the subject matter shall be judged with reference to an average person in the community of the actual age of the minor to whom such material is distributed, or exhibited. In all other cases, the subject matter shall be judged with reference to the average person in the community.

(c) 'Matter' means any book, magazine, newspaper, or other printed or written material or any picture, drawing, photograph, motion picture, play, nightclub performance, television production, or other pictorial representation, or any statue or other figure, or any recording, transcription or mechanical, chemical or electrical reproduction or any other articles, equipment, machines or materials.

(d) 'Person' means any individual, partnership, firm, association, corporation or other legal entity.

(e) 'Distribute' means to transfer possession of, whether with or without consideration, by any means.

(f) 'Knowingly' means having actual or constructive knowledge of the obscene contents of the subject matter. A person has constructive knowledge of the obscene contents, if he has knowledge of facts which would put a reasonable and prudent man on notice as to the suspect nature of the material, and the failure to

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inspect the contents is either for the purpose of avoiding such disclosure or is due to reckless conduct.

(g) 'Reckless conduct' is conduct which consciously disregards a substantial and unjustifiable risk that matter may be obscene. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that an average law-abiding person would observe in the actor's situation under like circumstances.

26-2102. AFFIRMATIVE DEFENSE. This Chapter shall not apply to persons who may possess or distribute obscene matter or participate in conduct otherwise proscribed by this Chapter when such possession, distribution or conduct occurs in the course of law enforcement activities, or in the course of bona fide scientific, educational, or comparable research or study, or like circumstances of justification. If this issue is not presented by the prosecution's evidence, the defendant may raise the same as an affirmative defense by presenting some evidence thereon. Where raised, the prosecution must sustain the burden of proving the defendant guilty beyond a reasonable doubt as to that issue.

26-2103. JURY TRIAL. Criminal prosecutions and other proceedings involving the ultimate issue of obscenity (as distinguished from the issue of 'probable cause') shall be tried by jury, unless both parties to the action waive a jury trial in writing or by statement in open court, entered in the minutes, with the approval of the court.

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26-2104. FUNCTION OF JURY AND COURT IN OBSCENITY TRIAL.

(a) The jury represents a cross section of the community and has a special aptitude for expressing the view of the average person. As the trier of fact, it is the exclusive judge of the common conscience of the community and the embodiment of community standards.

(b) Where a jury question is presented (i.e., that reasonable men may differ whether the subject matter or conduct is obscene) the trial court shall have no power either before, during, or after trial to dismiss an obscenity proceeding on the ground that the subject matter, or conduct, is not obscene as a matter of law, nor may an appellate court after trial set aside an obscenity verdict on the same grounds if an examination of the evidence indicates the verdict is supported by sufficient evidence.

(c) Any dismissal by the trial court on such grounds shall be appealable by the prosecution.

26-2105. PRESUMPTION. Every person is presumed to have knowledge of the standards that exist in the community and what the jury or trier of fact may declare to be obscene.

26-2106. GENERAL SALE OR DISTRIBUTION OF OBSCENE MATTER; PENALTY. Every person who knowingly sends or causes to be sent, or brings or causes to be brought, into this State for sale or distribution or exhibition; or in this State either (1) prepares, publishes, prints, exhibits, distributes, or offers to distribute; or (2) has in his possession with intent to distribute or to exhibit or offer to distribute; any obscene matter is guilty of a felony, and shall be punished by

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imprisonment for not less than one nor more than five years and by a fine of $5,000.

26-2107. DISTRIBUTION OF OBSCENE MATTER TO MINOR; PENALTY. Every person, who with knowledge that a person is a minor under 18 years of age, or who, while in possession of such facts that he should reasonably know that such person is a minor under 18 years of age, knowingly sends or causes to be sent, exhibits, distributes, or offers to distribute any obscene matter to a minor under 18 years of age, is guilty of a felony, and shall be punished by imprisonment for not less than one nor more than five years and by a $5,000 fine.

26-2108. HIRING, EMPLOYING MINOR TO ENGAGE IN ACTS DESCRIBED IN 26-2106; PENALTY. Every person who, with knowledge that a person is under 18 years of age, or who, while in possession of such facts that he should reasonably know that such person is under 18 years of age, hires, employs, or uses such minor to do or assist in doing any of the acts described in 26-2106 or 26-2107, is guilty of a felony, and shall be punished by imprisonment for not less than one nor more than five years and by a $5,000 fine.

26-2109. ADVERTISEMENT, PROMOTION OF SALE OF MATTER REPRESENTED TO BE OBSCENE; PENALTY. Every person who writes, creates, or solicits the publication or distribution of advertising or other promotional material for, or who otherwise advertises or promotes the sale, distribution, or exhibition of matter represented or held out by him to be obscene, whether or not such matter exists in fact, or is obscene, is guilty of a felony, and shall be punished by imprisonment for not less than one nor more than five years and by a $5,000 fine.

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26-2110. PARTICIPATION IN LEWD EXPOSURE OR SIMULATED ACTS OF SEXUAL INTERCOURSE OR PERVERSION AS A PART OF A PLAY.

(a) Every person who, during the course of a play, nightclub act, motion picture, television production, or other exhibition, or mechanical reproduction of human conduct, engages in any lewd exposure or simulated act of sexual intercourse or perversion, which if engaged in offstage or offscreen and in public, would be subject to prosecution, is guilty of a felony, and shall be punished by imprisonment for not less than one nor more than five years and by a $5,000 fine.

(b) Every person who procures, counsels, or assists any person to engage in such conduct, or who knowingly exhibits, or procures, counsels, or assists in the exhibition of a motion picture, television production or other mechanical reproduction containing such conduct is guilty of a felony, and shall be punished by imprisonment for not less than one nor more than five years and by a $5,000 fine.

26-2111. SINGING OBSCENE SONG OR BALLAD; PENALTY.

(a) Every person who sings or speaks any obscene song, ballad, or other words in any play, nightclub act, motion picture, television production, or other exhibition or medium reproducing human conduct, or in any public place, is guilty of a felony, and shall be punished by imprisonment for not less than one nor more than five years and by a $5,000 fine.

(b) Every person who procures, counsels, or assists any person to engage in such conduct, or who knowingly exhibits, or procures, counsels, or assists in the exhibition of a motion picture, television production, or other mechanical reproduction containing

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such conduct, is guilty of a felony, and shall be punished by imprisonment for not less than one nor more than five years and by a $5,000 fine.

26-2112. REQUIRING PURCHASER OR CONSIGNEE TO RECEIVE OBSCENE MATTER AS CONDITION TO SALE; PENALTY. Every person who, knowingly, as a condition to a sale, allocation, consignment, or delivery for resale of any paper, magazine, book, periodical, publication or other merchandise, requires that the purchaser or consignee receive any matter reasonably believed by the purchaser or consignee to be obscene, or who denies or threatens to deny a franchise, revokes or threatens to revoke, or imposes any penalty, financial or otherwise, by reason of the failure of any person to accept such matter, or by reason of the return of such matter, is guilty of a felony, and shall be punished by imprisonment for not less than one nor more than five years and by a $5,000 fine.

26-2113. PROBABLE CAUSE FOR SEIZURE TO BE SUMMARILY DETERMINED.

(a) If the seizure be controverted by any interested person, the court to whom any obscene matter is delivered pursuant to 26-2112 of this Chapter or to the return of a search warrant shall within one day after service upon the prosecuting attorney of a motion to suppress the evidence or restore the matter, proceed to take testimony in relation thereto. A decision as to whether there is probable cause to believe the seized material to be obscene shall be rendered by the court within two days of the conclusion of the restoration proceedings.

(b) If the motion to suppress the evidence is granted on the grounds of an unlawful seizure, the

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property shall be restored unless it is subject to confiscation as contraband, in which case it shall not be returned.

26-2114. CONTRABAND; DESTRUCTION OF OBSCENE MATTER OR ADVERTISEMENT OF MATTER REPRESENTED TO BE OBSCENE.

(a) Obscene matter and advertisements for matter represented to be obscene are contraband and shall be destroyed.

(b) Upon the conviction of the accused or rendition of a court order declaring such matter to be contraband and subject to confiscation, the court shall, when such judgments become final, order, upon five days' notice to the defendant, any matter or advertisement, in respect whereof the accused stands convicted, and which remains in the possession or under the control of the District Attorney or solicitor or any law enforcement agency, to be destroyed, and the court shall cause to be destroyed any such material in its possession or under its control, retaining only such copies as are necessary for law enforcement purposes.

26-2115. PREPARING OBSCENE MATTER OR ADVERTISING ELSEWHERE FOR SALE OR DISTRIBUTION IN THIS STATE; EXTRADITION. Every person, whether or not he is a citizen of or present in this State, who knowingly prepares, publishes, or prints obscene matter for sale or distribution in this State, or who knowingly sends or causes to be sent, or brings or causes to be brought by any means, into this State for sale or distribution therein, any obscene matter, or any advertising promoting the sale or distribution of matter represented or held out to be obscene, whether or not such matter exists in fact or is obscene, shall be subject to the penalties of this Chapter, and the executive authority of this State

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shall demand extradition of such person from the executive authority of the State in which such person is found.

26-2116. POLICY. The several sheriffs, constables, District Attorneys, solicitors, other prosecuting attorneys, and all other law enforcement officials shall vigorously enforce this Chapter within their respective jurisdictions.

26-2117. SEVERABILITY. If any provision hereof or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the Chapter which can be given effect without the invalid provision or application, and to this end the provisions of this Chapter are declared to be severable.

26-2118. SPECIFIC REPEALER. An Act approved April 2, 1969 (Ga. Laws 1969, p. 222), relating to the sale or delivery of certain harmful material to minors, is hereby repealed in its entirety."

Section 2. All laws and parts of laws in conflict with this Act are hereby repealed.

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S. B. No. 108

A BILL

To be entitled an Act to amend Code Chapter 26-21, relating to distributing obscene matter, as amended, so as to substantially change said Code Chapter; to repeal conflicting laws; and for other purposes.

2-3 1921

The Committee of the Senate on Judiciary recommends that this Bill do pass by substitute SBH-113

Chairman.

IN SENATE

Read 1st Time Jan. 22 1921

Read 2nd Time Mar. 4 1921

Read 3rd Time March 5 1921

and Passed by Unanimous

Ayes 29 Nays 0

Secretary of the Senate.

By GARRARD of the 37th

WAIVING OF THE 43rd

Referred to Committee on Judiciary

APPENDIX I

Page

Copy of substitute Senate Bill 108, offered by the Senate Committee on the Judiciary on March 4, 1971, proposing new code sections 26-2103, 26-2104, 26-2105 and 26-2106 and an amendment to existing code section 26-2601(a) 3-11

(Obtained from Archives Building of Georgia State Archives)

The Senate Committee on Judiciary offers the following substitute to SB 108:

A BILL TO BE ENTITLED

AN ACT

To amend Code Chapter 26-21, relating to distributing obscene matter, as amended, by an Act approved March 10, 1970 (Ga. Laws 1970, p. 173), so as to define the word "knowing" as used in said Chapter; to provide that the use of any premises in violation of the Chapter shall constitute a public nuisance; to provide that it shall be unlawful to participate in exhibitions of indecent exposure or to counsel a person to so participate, and to provide punishment therefor; to provide that obscene materials shall be contraband; to provide for severability; to repeal conflicting laws; and for other purposes.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF GEORGIA:

Section 1. Code Chapter 26-21, relating to distributing obscene matter, as amended, by an Act approved March 10, 1970 (Ga. Laws 1970, p. 173), is hereby amended by adding a new sentence at the end of Code Section 26-2601(a) to read as follows:

"Provided, that the word 'knowing' as used herein shall be deemed to be either actual or constructive knowledge of the obscene contents of the subject matter; and a person has constructive knowledge of the obscene contents if he has knowledge of facts which would put a reasonable and prudent man on notice as to the suspect nature of the material.",

so that when so amended, Code Section 26-2601(a) shall read as follows:

ADOPTED IN SENATE
3-5 1971
Ayes 44 Nays 0
Hamilton Jr.

ADOPTED IN [illegible]
3-5
Ayes 44 Nays 0
Hamilton Jr.

LC 3 01375

"26-2601. Distributing obscene materials.--(a) A person commits the offense of distributing obscene materials when he sells, lends, rents, leases, gives, advertises, publishes, exhibits or otherwise disseminates to any person any obscene material of any description, knowing the obscene nature thereof, or who offers to do so, or who possesses such material with the intent so to do. Provided, that the word 'knowing' as used herein shall be deemed to be either actual or constructive knowledge of the obscene contents of the subject matter; and a person has constructive knowledge of the obscene contents if he has knowledge of facts which would put a reasonable and prudent man on notice as to the suspect nature of the material."

Section 2. Said Code Chapter 26-21 is hereby further amended by adding thereto a new Code Section to be known as Code Section 26-2103 which shall provide as follows:

"26-2103. The use of any premises in violation of any of the provisions of this Chapter shall constitute a public nuisance."

Section 3. Said Code Chapter 26-21 is hereby further amended by adding thereto a new Code Section to be known as Code Section 26-2104 which shall provide as follows:

"26-2104. Any materials declared to be obscene by the provisions of this Chapter and advertisements for such materials are hereby declared to be contraband."

Section 4. Said Code Chapter 26-21 is hereby further amended by adding thereto a new Code Section to be

known as Code Section 26-2105 which shall provide as follows:

"26-2105. (a) Every person who, during the course of a play, night club act, motion picture, television production or other exhibition, or mechanical reproduction of human conduct, engages in conduct which would be public indecency under Code Section 26-2011 if performed in a public place, shall be guilty of participation in indecent exposure and upon conviction shall be punished as for a misdemeanor.

(b) Every person who procures, counsels or assists any person to engage in such conduct or who knowingly exhibits or procures, counsels or assists in the exhibition of a motion picture, television production or other mechanical reproduction containing such conduct shall be guilty of a misdemeanor."

Section 5. Said Code Chapter 26-21 is hereby further amended by adding thereto a new Code Section 26-2106 which shall provide as follows:

"26-2106. If any provision of this Chapter or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of this Chapter which can be given effect without the invalid provision or application, and to this end the provisions of this Chapter are declared to be severable."

Section 6. This Act shall become effective upon its approval by the Governor or upon its becoming law without his approval.

Section 7. All laws and parts of laws in conflict with this Act are hereby repealed.

LC 3 01378
(SCS)

SENATE BILL 108

By: Senators Garrard of the 37th and Walling of the 42nd

A BILL TO BE ENTITLED

AN ACT

To amend Code Chapter 26-21, relating to distributing obscene matter, as amended, by an Act approved March 10, 1970 (Ga. Laws 1970, p. 173), so as to define the word "knowing" as used in said Chapter; to provide that the use of any premises in violation of the Chapter shall constitute a public nuisance; to provide that it shall be unlawful to participate in exhibitions of indecent exposure or to counsel a person to so participate, and to provide punishment therefor; to provide that obscene materials shall be contraband; to provide for severability; to repeal conflicting laws; and for other purposes.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF GEORGIA:

Section 1. Code Chapter 26-21, relating to distributing obscene matter, as amended, by an Act approved March 10, 1970 (Ga. Laws 1970, p. 173), is hereby amended by adding a new sentence at the end of Code Section 26-2601(a) to read as follows:

"Provided, that the word 'knowing' as used herein shall be deemed to be either actual or constructive knowledge of the obscene contents of the subject matter; and a person has constructive knowledge of the obscene contents if he has knowledge of facts which would put a reasonable and prudent man on notice as to the suspect nature of the material.",

so that when so amended, Code Section 26-2601(a) shall read as follows:

LC 3 01376
(SCS)

"26-2601. Distributing obscene materials.—.a) A person commits the offense of distributing obscene materials when he sells, lends, rents, leases, gives, advertises, publishes, exhibits or otherwise disseminates to any person any obscene material of any description, knowing the obscene nature thereof, or who offers to do so, or who possesses such material with the intent so to do. Provided, that the word 'knowing' as used herein shall be deemed to be either actual or constructive knowledge of the obscene contents of the subject matter; and a person has constructive knowledge of the obscene contents if he has knowledge of facts which would put a reasonable and prudent man on notice as to the suspect nature of the material."

Section 2. Said Code Chapter 26-21 is hereby further amended by adding thereto a new Code Section to be known as Code Section 26-2103 which shall provide as follows:

"26-2103. The use of any premises in violation of any of the provisions of this Chapter shall constitute a public nuisance."

Section 3. Said Code Chapter 26-21 is hereby further amended by adding thereto a new Code Section to be known as Code Section 26-2104 which shall provide as follows:

"26-2104. Any materials declared to be obscene by the provisions of this Chapter and advertisements for such materials are hereby declared to be contraband."

Section 4. Said Code Chapter 26-21 is hereby further amended by adding thereto a new Code Section to be

known as Code Section 26-2105 which shall provide as follows:

"26-2105. (a) Every person who, during the course of a play, night club act, motion picture, television production or other exhibition, or mechanical reproduction of human conduct, engages in conduct which would be public indecency under Code Section 26-2011 if performed in a public place, shall be guilty of participation in indecent exposure and upon conviction shall be punished as for a misdemeanor.

(b) Every person who procures, counsels or assists any person to engage in such conduct or who knowingly exhibits or procures, counsels or assists in the exhibition of a motion picture, television production or other mechanical reproduction containing such conduct shall be guilty of a misdemeanor."

Section 5. Said Code Chapter 26-21 is hereby further amended by adding thereto a new Code Section 26-2106 which shall provide as follows:

"26-2106. If any provision of this Chapter or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of this Chapter which can be given effect without the invalid provision or application, and to this end the provisions of this Chapter are declared to be severable."

Section 6. This Act shall become effective upon its approval by the Governor or upon its becoming law without his approval.

LC 3 01376
(SCS)

Section 7. All laws and parts of laws in conflict with this Act are hereby repealed.

S.B. 108 LC 5 0249

ANALYSIS

Substantially changes criminal laws relating to obscene materials; repeals Ga. Laws 1969, p. 222, relating to distribution of obscene materials to minors; replaces Code Chapter 26-21, relating to distributing obscene materials.

S. B. No. 108 — To Gov. 3/23/71

A BILL

To be entitled an Act to amend Code Chapter 26-21, relating to distributing obscene matter, as amended, so as to substantially change said Code Chapter; to repeal conflicting laws; and for other purposes;

March 6, 1971

The Committee of the House on Special Judiciary reports that this Bill do pass

Horace A. Rush
Chairman

IN SENATE

Read 1st time Jan. 22, 1971
Read 2nd time Mar. 4, 1971
Read 3rd time Mar. 5, 1971
And Passed
Ayes 29 Nays 0

Hamilton McWhorter Jr.
Secretary of the Senate

ENGROSSING

March 5, 1971

The Committee of the Senate on Senate Administrative Affairs has examined the within and finds the same properly engrossed.

Frank Ellis Jr.
Chairman

IN HOUSE

Read 1st time Mar. 5, 1971
Read 2nd time Mar 6, 1971
Read 3rd time Mar 9, 1971
And Passed
Ayes 104 Nays 4

Brian Wrenn
Clerk of the House

By: Senators Garrard of the 37th and Walling of the 42nd

Special Judiciary

Signed by Governor
4/1/71

APPENDIX J

Page

Senate Bill 108, as approved by Governor of Georgia on April 1, 1971, enacting new code sections 26-2103, 26-2104, 26-2105 and 26-2106 and amending existing code section 26-2601(a). 3-6

(Obtained from Archives Building of Georgia State Archives)

Senate Bill 108, as printed in the Georgia Laws, 1971 Session at pp 344-346. 7-9

A BILL

To amend Code Chapter 26-21, relating to distributing obscene matter, as amended, by an Act approved March 10, 1970 (Ga. Laws 1970, p. 173), so as to define the word "knowing" as used in said Chapter; to provide that the use of any premises in violation of the Chapter shall constitute a public nuisance; to provide that it shall be unlawful to participate in exhibitions of indecent exposure or to counsel a person to so participate, and to provide punishment therefor; to provide that obscene materials shall be contraband; to provide for severability; to repeal conflicting laws; and for other purposes.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF GEORGIA:

Section 1. Code Chapter 26-21, relating to distributing obscene matter, as amended, by an Act approved March 10, 1970 (Ga. Laws 1970, p. 173), is hereby amended by adding a new sentence at the end of Code Section 26-2601(a) to read as follows:

"Provided, that the word 'knowing' as used herein shall be deemed to be either actual or constructive knowledge of the obscene contents of the subject matter; and a person has constructive knowledge of the obscene contents if he has knowledge of facts which would put a reasonable and prudent man on notice as to the suspect nature of the material.",

so that when so amended, Code Section 26-2601(a) shall read as follows:

"26-2601. Distributing obscene materials.—(a) A person commits the offense of distributing obscene materials when he sells, lends, rents, leases, gives, advertises, publishes, exhibits or otherwise disseminates to any person any obscene material of any description, knowing the obscene nature thereof, or who offers to do so, or who possesses such material with the intent so to do. Provided, that the word 'knowing' as used herein shall be deemed to be either actual or constructive knowledge of the obscene contents of the subject matter; and a person has constructive knowledge of the obscene contents if he has knowledge of facts which would put a reasonable and prudent man on notice as to the suspect nature of the material."

Section 2. Said Code Chapter 26-21 is hereby further amended by adding thereto a new Code Section to be known as Code Section 26-2103 which shall provide as follows:

"26-2103. The use of any premises in violation of any of the provisions of this Chapter shall constitute a public nuisance."

Section 3. Said Code Chapter 26-21 is hereby further amended by adding thereto a new Code Section to be known as Code Section 26-2104 which shall provide as follows:

"26-2104. Any materials declared to be obscene by the provisions of this Chapter and advertisements for such materials are hereby declared to be contraband."

Section 4. Said Code Chapter 26-21 is hereby further amended by adding thereto a new Code Section to be known as Code Section 26-2105 which shall provide as follows:

"26-2105. (a) Every person who, during the course of a play, night club act, motion picture, television production or other exhibition, or mechanical reproduction of human conduct, engages in conduct which would be public indecency under Code Section 26-2011 if performed in a public place, shall be guilty of participation in indecent exposure and upon conviction shall be punished as for a misdemeanor.

(b) Every person who procures, counsels or assists any person to engage in such conduct or who knowingly exhibits or procures, counsels or assists in the exhibition of a motion picture, television production or other mechanical reproduction containing such conduct shall be guilty of a misdemeanor."

Section 5. Said Code Chapter 26-21 is hereby further amended by adding thereto a new Code Section 26-2106 which shall provide as follows:

"26-2106. If any provision of this Chapter or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of this Chapter which can be given effect without the invalid provision or application, and to this end the provisions of this Chapter are declared to be severable."

Section 6. This Act shall become effective upon its approval by the Governor or upon its becoming law without his approval.

Section 7. All laws and parts of laws in conflict with this Act are hereby repealed.

APPROVED
APR 1 1971
BY GOVERNOR

Section 4. All laws and parts of laws in conflict with this Act are hereby repealed.

Approved April 1, 1971.

CRIMES—OBSCENE MATTERS—PUBLIC NUISANCE, ETC.

Code Chapter 26-21 Amended.

No. 304 (Senate Bill No. 108).

An Act to amend Code Chapter 26-21, relating to distributing obscene matter, as amended, by an Act approved March 10, 1970 (Ga. L. 1970, p. 173), so as to define the word "knowing" as used in said Chapter; to provide that the use of any premises in violation of the Chapter shall constitute a public nuisance; to provide that it shall be unlawful to participate in exhibitions of indecent exposure or to counsel a person to so participate, and to provide punishment therefor; to provide that obscene materials shall be contraband; to provide for severability; to repeal conflicting laws; and for other purposes.

Be it enacted by the General Assembly of Georgia:

Section 1. Code Chapter 26-21, relating to distributing obscene matter, as amended, by an Act approved March 10, 1970 (Ga. L. 1970, p. 173), is hereby amended by adding a new sentence at the end of Code section 26-2601 (a) to read as follows:

"Provided, that the word 'knowing' as used herein shall be deemed to be either actual or constructive knowledge of the obscene contents of the subject matter; and a person has constructive knowledge of the obscene contents if he has knowledge of facts which would put a reasonable and prudent man on notice as to the suspect nature of the material.",

so that when so amended, Code section 26-2601 (a) shall read as follows:

"26-2601. Distributing obscene materials. (a) A person commits the offense of distributing obscene materials when he sells, lends, rents, leases, gives, advertises, publishes, exhibits or otherwise disseminates to any person any obscene material of any description, knowing the obscene nature thereof, or who offers to do so, or who possesses such material with the intent so to do. Provided, that the word 'knowing' as used herein shall be deemed to be either actual or constructive knowledge of the obscene contents of the subject matter; and a person has constructive knowledge of the obscene contents if he has knowledge of facts which would put a reasonable and prudent man on notice as to the suspect nature of the material." Code § 26-2601 amended. "Knowing" defined.

Section 2. Said Code Chapter 26-21 is hereby further amended by adding thereto a new Code section to be known as Code section 26-2103 which shall provide as follows:

"26-2103. The use of any premises in violation of any of the provisions of this Chapter shall constitute a public nuisance." Code § 26-2103 enacted.

Section 3. Said Code Chapter 26-21 is hereby further amended by adding thereto a new Code section to be known as Code section 26-2104 which shall provide as follows:

"26-2104. Any materials declared to be obscene by the provisions of this Chapter and advertisements for such materials are hereby declared to be contraband." Code § 26-2104 enacted.

Section 4. Said Code Chapter 26-21 is hereby further amended by adding thereto a new Code section to be known as Code section 26-2105 which shall provide as follows:

"26-2105. (a) Every person who, during the course of a play, night club act, motion picture, television production or other exhibition, or mechanical reproduction of human conduct, engages in conduct which would be public indecency under Code section 26-2011 if performed in a Code § 26-2105 enacted.

public place, shall be guilty of participation in indecent exposure and upon conviction shall be punished as for a misdemeanor.

Penalty.

(b) Every person who procures, counsels or assists any person to engage in such conduct or who knowingly exhibits or procures, counsels or assists in the exhibition of a motion picture, television production or other mechanical reproduction containing such conduct shall be guilty of a misdemeanor."

Section 5. Said Code Chapter 26-21 is hereby further amended by adding thereto a new Code section 26-2106 which shall provide as follows:

Code § 26-2106 enacted.

"26-2106. If any provision of this Chapter or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of this Chapter which can be given effect without the invalid provision or application, and to this end the provisions of this Chapter are declared to be severable."

Effective date.

Section 6. This Act shall become effective upon its approval by the Governor or upon its becoming law without his approval.

Section 7. All laws and parts of laws in conflict with this Act are hereby repealed.

Approved April 1, 1971.

REVENUE—CIGAR AND CIGARETTE TAX EXEMPTION—VETERANS HOMES.

No. 389 (Senate Bill No. 295).

An Act to amend an Act imposing a tax upon the sale, use or other disposition of cigars and cigarettes within this State, approved March 1, 1955 (Ga. L. 1955, p. 268), as amended, so as to provide that the taxes imposed by this

APPENDIX K

Page

Albany Herald news article of May 13, 1971, reporting on Dougherty County District Attorney's warning letter to theater operators. 3

District Attorney Promises Crackdown On Sex Movies Here After Jury Action

6-13-71

District Attorney Robert Reynolds today served notice on local theaters that he would enforce a Georgia law going into effect July 1 and dealing with obscene movies.

The action followed presentments today by a Dougherty Superior Court grand jury, which set forth that "We are in full support of Georgia Senate Bill [illegible] House Bill 207 relating to distribution of obscene matters . . . and direct the district attorney to fully enforce all provisions of these bills."

Down, Too . . .

The bill outlaws "adult bookstore" materials and the showing of X-rated films in "adult movie" houses. It defines an "adult movie house" as "any movie theater which on regular, continuing basis shows films rated X by the Motion Picture Coding Association of America, or any movie which presents for public viewing on a regular, continuing basis so-called adult films depicting sexual conduct."

Reynolds sent all local theaters the following letter:

"Pursuant to the instructions of the May, 1971 grand jury, I intend to enforce the laws which go into effect on July 1, 1971. I am enclosing a copy of these laws which go into effect July 1, 1971."

The grand jurors in other sections of the presentments expressed concern over "child delinquency and school truancy" and its alarm "in fears of the amount of narcotics traffic in our community."

They recommended the employment of a full-time deputy to work with youth of the community "toward building a better relationship between youth and law enforcement."

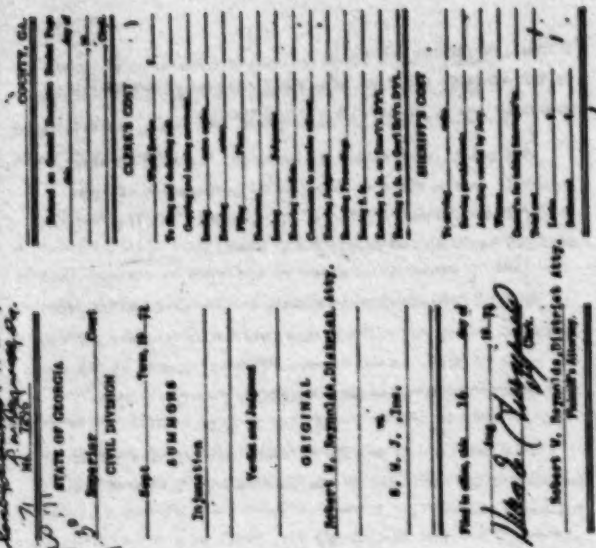
APPENDIX L

Robert W. Reynolds, District Attorney on behalf of the *State of Georgia v. S.W.J. Inc.* (being a Petition for an Injunction) in the Superior Court of Dougherty County, C.A. 7296

Papers included in Appendix	Page
Summons issued Aug. 16, 1971	3
Petition for Injunction, filed Aug. 16, 1971	4-6
Order to show cause on Aug. 23, 1971	6
Defendants Response to Petition, filed Aug. 19, 1971	7-10

Petition for Removal in Robert W. Reynolds, District Attorney, on behalf of the *State of Georgia v. S.W.J. Inc.*, in the United States District Court for the Middle District of Georgia, Albany Division, filed Friday, Aug. 20, 1971

Papers included in Appendix	
Petition for Removal, filed Aug. 20, 1971	11-29



COUNTY, GA.

Return to Court Docket Entry Page No. ____ of ____

No. ____ Term, 19__

CLERK'S COST

Docket Entry ____

To filing and docketing suit ____

Copying and issuing summons ____

Issuing ____ writs ____

Issuing ____ subpoenas ____

Filing ____ Pltn. ____

Recording ____ Judgments ____

Issuing ____ writs ____

Commission to examine witness ____

Recording Judgment ____

Recording Proceedings ____

Issuing ____ fi. fa. ____

Recording ____ fi. fa. on Docket Entry ____

Recording ____ fi. fa. on Docket Entry ____

SHERIFF'S COST

To service ____ writs ____

Serving garnishments ____

Attending court ____ days ____

Mileage ____

Deputy's fee taking testimony ____

Total cost ____

Levies ____

Deliveries ____

STATE OF GEORGIA

Superior Court

CIVIL DIVISION

Sept. Term, 19--22

SUMMONS

Injunction

Verdict and Judgment

ORIGINAL

Robert W. Reynolds, District Atty.

vs.

S. W. J., Jnr.

Filed in office, this 16 day of Aug 19--22

Clerk

Robert W. Reynolds, District Atty.

Plaintiff's Attorney

GEORGIA, _____ COUNTY:

I have this day served the Defendant _____

personally with a true copy of the within petition and summons.

This the _____ day of _____, 19__

_____

Sheriff.

GEORGIA, _____ COUNTY:

I have this day served the Defendant _____

with a true copy of the within petition and summons by leaving same at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein.

This the _____ day of _____, 19__

_____

Sheriff.

GEORGIA, Dooghat COUNTY:

I have this day served the Defendant Wife Jo

a corporation, with a true copy of the within petition and summons by handing same to person to _____

Robert Woodard, an officer of said corporation.

This the 16 day of Aug 1922

C Thompson Dy

Sheriff.

By _____ Dep.

1-10-74

7896

GEORGIA, DOUGHERTY COUNTY

TO THE SUPERIOR COURT OF SAID STATE AND COUNTY AND TO THE HONORABLE ASA D. KELLEY, JR., JUDGE THEREOF:

The petition of Robert W. Reynolds, District Attorney, on behalf of the State of Georgia, on information of Lynn Stout, Investigator for the Dougherty County Sheriff, brings this his petition and respectfully shows:

(1)

S. W. J., Inc., defendant herein, is a resident of said State and County and operates and does business under the name and style of Broad Avenue Cinema, which is located at 248 Broad Avenue in the City of Albany, Dougherty County, Georgia.

(2)

This petition is brought to abate and enjoin a public nuisance being conducted by the defendant by virtue of the following facts.

(3)

Since July 1, 1971, the defendant has daily exhibited motion pictures showing human conduct at said premises at 248 Broad Avenue to members of the public and to the said Lynn Stout, which would be public indecency under Code Section 26-2011 if performed in a public place because on a continuous basis, from July 1, 1971 and up and until the filing of this petition defendant has daily shown, exhibited, and disseminated motion pictures showing various persons in acts of

(a) sexual intercourse

(b) lewd exposure of sexual organs

(c) lewd appearance in a state of partial or complete nudity

(d) a lewd caress or indecent fondling of the body of another person

(4)

Petitioner attaches hereto and makes a part hereof, Exhibit I, which are photographs of a cross section of the movie pictures which have been exhibited at said premises since July 1, 1971.

(5)

The officers of said defendant corporation are Whitfield S. Woodall, Billy Wayne Simpson, and Billy R. Jenkins, and said officers had actual knowledge of the obscene nature of the subject matter of the motion pictures being exhibited on said premises.

(6)

The lewd, vulgar and obscene motion pictures exhibited by defendant greatly tend to corrupt the morals of the public in general and the youth of this community in particular and petitioner has no adequate remedy at law because while the defendant's conduct constitutes a crime, a corporation, if convicted, can only be fined, and the corrupt and lewd pictures will continue to be exhibited by defendant and for these reasons equity should grant petitioner a temporary restraining order and a permanent injunction.

WHEREFORE, petitioner prays:

(1) That process issue requiring the defendant to be and appear and answer this complaint and that Whitfield Woodall be served in person with a copy of this complaint.

(2) That a permanent injunction be granted for the restraint and abatement of the public nuisance existing on the premises at the Broad Avenue Cinema at 348 Broad Avenue and pending the trial of this case the defendant be temporarily restrained and enjoined from the continuance of said nuisance upon said premises.

Robert N. Reynolds
DISTRICT ATTORNEY

GEORGIA, DOUGHERTY COUNTY

Personally before the undersigned officer authorized by law to administer oaths appeared Lynn Stout, who after being first duly sworn, states on oath that the facts set forth in the above and foregoing petition are true and correct.

Lynn S. Stout

Sworn and subscribed to before me this 12th day of August, 1971.

Dorothy W. Flaggard
Notary Public, Dougherty County, Georgia

ORDER

The above and foregoing petition having been read and considered let the same be filed and let a copy of the petition along with a copy of this order be served upon the defendant in person.

The defendant is required to show cause before me at the Courthouse in Albany, Georgia, on the 23 day of August, 1971, at 11 o'clock AM. why the prayer of the petitioner should not be granted and why the defendant should not be temporarily restrained from carrying on a public nuisance upon said premises pending the trial of this case.

This 12 day of August, 1971.

JUDGE, DOUGHERTY SUPERIOR COURT

IN THE SUPERIOR COURT DOUGHERTY COUNTY, STATE OF GEORGIA
CIVIL ACTION FILE NO. 7296

ROBERT W. REYNOLDS, DISTRICT ATTORNEY ON BEHALF OF THE STATE OF GEORGIA,

Plaintiff

Vs.

S. W. J., INC.,

Defendant

PETITION FOR INJUNCTION

FILED IN OFFICE
This 19 day Aug 1971
Carson B. Carver
Clerk
By

SMITH, GARDNER, WIGGINS, GEER & BRAMBERRY
ATTORNEYS AT LAW
ALBANY, GEORGIA

Dismissed by Plaintiff's Atty.
Aug
Aug
1-10-74

IN THE SUPERIOR COURT DOUGHERTY

COUNTY, STATE OF GEORGIA

ROBERT W. REYNOLDS, DISTRICT ATTORNEY ON BEHALF OF THE STATE OF GEORGIA,	)	CIVIL ACTION
Plaintiff	)	FILE NO. 7296
VS.	)	
S. W. J., INC.,	)	
Defendant	)	PETITION FOR INJUNCTION

The defendant enters its responsive pleading to the petition in the above stated matter as follows:

FIRST DEFENSE

1.

The petition fails to state a claim against this defendant upon which relief may be granted.

SECOND DEFENSE

2.

Defendant admits Paragraph 1 of the petition.

3.

Defendant denies Paragraphs 2, 3, 4, 5 and 6 of the petition.

THIRD DEFENSE

4.

Defendant shows that to grant the relief sought by the petition would deprive defendant of its rights under the First Amendment to the United States Constitution.

[illegible]

WHEREFORE, defendant prays that the petition be dismissed and that defendant be discharged.

SMITH, GARDNER, VIGGINS, GEER & BRIMBERRY

BY: Peter Zack Geer
PETER ZACK GEER
COUNSEL FOR D.V.J., INC.

[illegible]

This is to certify that I have this day served counsel for the opposite party in this case with a copy of this pleading by placing same in the United States mail in a properly addressed envelope with sufficient postage thereon.

This 8th day of August, 1971.

Smith, Gardner, Viggins, Geer & Brimberry

By: Peter Zack Geer (AW)
Attorneys for Defendant

POOR COPY

GEORGIA, ROCKDALE COUNTY

Personally appearing before the undersigned attesting officer comes now BILLY R. JENKINS who, after being first duly sworn deposes and upon oath says that he is President of the defendant corporation, SHJ, Inc. and that the denials, facts and allegations contained in the attached and foregoing pleadings are true and correct to the best of his knowledge and belief.

BILLY R. JENKINS

Sworn to and subscribed before
me this the 16th day of
August, 1971.

Evelyn K. Compton
NOTARY PUBLIC

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF
GEORGIA, ALBANY DIVISION

ROBERT W. REYNOLDS, DISTRICT ATTORNEY, ON BEHALF OF THE STATE OF GEORGIA,

Plaintiff

Vs.

S.W.J., INC.,

Defendant

PETITION FOR REMOVAL

FILED IN OFFICE

this 20 day of Aug 19 91

Susan B. Carmen
Clerk
Dep

SMITH, GARDNER, WIGGINS,
GEER & BRIMBERRY
ATTORNEYS AT LAW
ALBANY, GEORGIA 31701

UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF GEORGIA

ALBANY DIVISION

ROBERT W. REYNOLDS, DISTRICT ATTORNEY, ON BEHALF OF THE STATE OF GEORGIA,	IN THE SUPERIOR COURT OF DOUGHERTY COUNTY, GEORGIA
Plaintiff	CIVIL ACTION FILE NO. 7296
VS.	
S.W.J., INC.,	
Defendant	PETITION FOR INJUNCTION

FILED in Office AUG 20 1971 Deputy Clerk, U.S. District Court

Defendant in the above identified and numbered action now pending in the above stated Court, files this petition for removal to the United States District Court Middle District of Georgia, Albany Division, and shows:

1.

That a Civil Action for Injunction has been commenced and is now pending in the Superior Court of Dougherty County, Georgia, Case No. 7296, wherein Robert W. Reynolds, District Attorney, on behalf of the State of Georgia, is plaintiff and your petitioner herein for removal is defendant, said action being hereinafter sometimes referred to as Action No. 7296.

2.

That said Action 7296 involves the application and construction of the First Amendment to the United States Constitution.

3.

That process in said Action 7296 was served on your petitioner for removal on the 16th day of August, 1971, copy of

case being marked Exhibit "A", attached hereto and made a part hereof, the case being the only pleading served upon your petitioner for removal in said cause.

4.

That your petitioner for removal herewith presents a good and sufficient bond as provided by statute, conditioned that petitioner will pay all costs and disbursements incurred by reason of the removal proceedings should it be determined that the case was not removable or was improperly removed.

5.

That a copy of all process, pleadings and orders served upon your petitioner for removal in said Civil Action No. 7296 is filed herewith as Exhibit "A" hereof.

WHEREFORE, petitioner for removal prays that said Civil Action No. 7296 now pending in the Superior Court of Dougherty County, Georgia, be removed from said State Court into United States District Court Middle District of Georgia, Albany Division, for trial and determination.

This the 20th day of August, 1971.

SMITH, GARDNER, VIGGINS, GREE & BRINKERLY

BY: Peter Zack Geer
PETER ZACK GEER
COUNSEL FOR PETITIONER FOR REMOVAL

GEORGIA, DOUGHERTY COUNTY

TO THE SUPERIOR COURT OF SAID STATE AND COUNTY AND TO THE HONORABLE ASA D. KELLEY, JR., JUDGE THEREOF:

The petition of Robert W. Reynolds, District Attorney, on behalf of the State of Georgia, on information of Lynn Stout, Investigator for the Dougherty County Sheriff, brings this his petition and respectfully shows:

(1)

S. W. J., Inc., defendant herein, is a resident of said State and County and operates and does business under the name and style of Broad Avenue Cinema, which is located at 248 Broad Avenue in the City of Albany, Dougherty County, Georgia.

(2)

This petition is brought to abate and enjoin a public nuisance being conducted by the defendant by virtue of the following facts.

(3)

Since July 1, 1971, the defendant has daily exhibited motion pictures showing human conduct at said premises at 248 Broad Avenue to members of the public and to the said Lynn Stout, which would be public indecency under Code Section 26-2011 if performed in a public place because on a continuous basis, from July 1, 1971 and up and until the filing of this petition defendant has daily shown, exhibited, and disseminated motion pictures showing various persons in acts of

(a) sexual intercourse

(b) lewd exposure of sexual organs

(c) lewd appearance in a state of partial or complete nudity

(d). a lewd caress or indecent fondling of the body of another person

EXHIBIT "A"

(4)

Petitioner attaches hereto and makes a part hereof, Exhibit I, which are photographs of a cross section of the movie pictures which have been exhibited at said premises since July 1, 1971.

(5)

The officers of said defendant corporation are Whitfield B. Woodall, Billy Wayne Simpson, and Billy R. Jenkins, and said officers had actual knowledge of the obscene nature of the subject matter of the motion pictures being exhibited on said premises.

(6)

The lewd, vulgar and obscene motion pictures exhibited by defendant greatly tend to corrupt the morals of the public in general and the youth of this community in particular and petitioner has no adequate remedy at law because while the defendant's conduct constitutes a crime, a corporation, if convicted, can only be fined, and the corrupt and lewd pictures will continue to be exhibited by defendant and for these reasons equity should grant petitioner a temporary restraining order and a permanent injunction.

WHEREFORE, petitioner prays:

(1) That process issue requiring the defendant to be and appear and answer this complaint and that Whitfield Woodall be served in person with a copy of this complaint.

(2) That a permanent injunction be granted for the restraint and abatement of the public nuisance existing on the premises at the Broad Avenue Cinema at 248 Broad Avenue and pending the trial of this case the defendant be temporarily restrained and enjoined from the continuance of said nuisance upon said premises.

Robert K. Reynolds
DISTRICT ATTORNEY

GEORGIA, DOUGHERTY COUNTY

Personally before the undersigned officer authorized by law to administer oaths appeared Lynn Shoat, who after being first duly sworn, states on oath that the facts set forth in the above and foregoing petition are true and correct.

Lynn Shoat

Sworn and subscribed to before me this 16th day of August, 1971.

Notary Public, Dougherty County, Georgia

ORDER

The above and foregoing petition having been read and considered let the same be filed and let a copy of the petition along with a copy of this order be served upon the defendant in person.

The defendant is required to show cause before me at the Courthouse in Albany, Georgia, on the 23 day of August, 1971, at 11 o'clock A.M. why the prayer of the petitioner should not be granted and why the defendant should not be temporarily restrained from carrying on a public nuisance upon said premises pending the trial of this case.

This 16 day of August, 1971.

JUDGE, DOUGHERTY SUPERIOR COURT

EXHIBIT J

July 4, 1991
(Date)

Midnight Clambake
(Name of motion picture film)

EXHIBIT 3

July 14, 1991
(date)

The Ranger
(name of motion picture film)

EXHIBIT A

July 12, 1991
(date)

Sweet Birds of Aquatica
(name of motion picture film)

EXHIBIT I

June 12, 1971
(Date)

Sweet Bird of Paradise
(Name of motion picture film)

EXHIBIT I

July 17, 1991
(Date)

Sweet Bird of Youth
(Name of motion picture film)

EXHIBIT A

July 14, 1991
(Date)

The Revenger
(name of motion picture film)

EXHIBIT I

JULY 22nd 1971
(date)

SOUTHERN COMFORT
(name of motion picture film)

EXHIBIT I

JULY 22nd 1971
(date)

SOUTHERN COMFORT
(name of motion picture film)

EXHIBIT I

JULY 22nd 1971
(date)

TABACCO ROOT J.S.
(name of motion picture film)

STATE OF GEORGIA

Superior
COURT

Dougherty COUNTY

Civil Action, File No. 7296

Robert W. Reynolds, District Attorney

Plaintiff,

vs.

S. W. J., Inc.

Defendant.

SUMMONS

Injunction

To the above-named Defendant: S. W. J., Inc.

You are hereby commanded and required to file with the Clerk of said Court and serve upon Robert W. Reynolds, District Attorney

Plaintiff's attorney, whose address is Dougherty County Courthouse, Albany, Ga.

an answer to the complaint which is herewith served upon you, within 30 days after service of this summons, upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

This the 16 day of August, 19 71

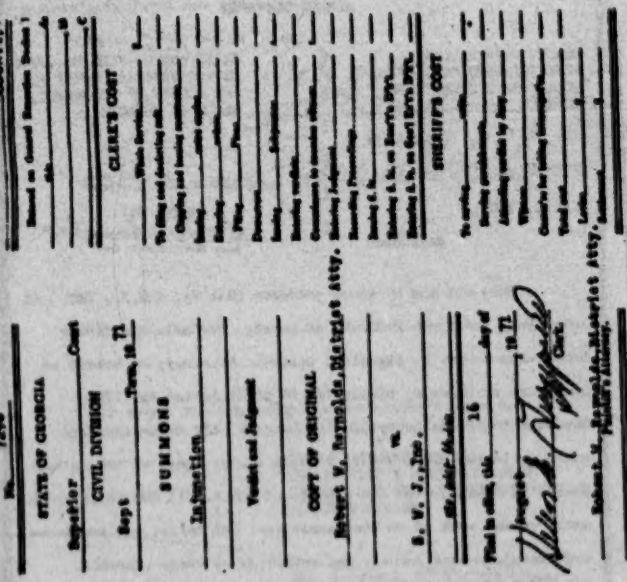
Clerk of Court.

To the Defendant upon whom this Summons is served:

This copy of Summons was served upon you on the _____ day of _____, 19__

_____

Sheriff of _____ County.



No. 7296

STATE OF GEORGIA

Superior Court

CIVIL DIVISION

Sept. Term, 19 71

SUMMONS

In Equation

Verdict and Judgment

COPY OF ORIGINAL

Robert V. Reynolds, Metrics Atty.

vs.

S. W. J., Inc.

Mr. Mitz Mohn

Filed in office, this 16 day of Aug, 19 71

Deputy Clerk

COUNTY, ss:

Personally appeared Robert V. Reynolds, Metrics Atty. who on oath deposes and says that he is the Plaintiff's Attorney in the above stated case, and that the defendant is indebted to the plaintiff in the sum of $ 0 principal, $ 0 interest, $ 0 attorney's fee, and $ 0 costs, and that the defendant is not in the military service of the United States.

Robert V. Reynolds, Metrics Atty.

Plaintiff's Attorney

Sworn to and subscribed before me this 16 day of Aug, 19 71

Notary Public

CLERK'S COST

Writ Service $

To filing and docketing suit

Copying and issuing summons

Issuing

Filing

Docketing

Issuing verdict

Issuing Judgment

Recording Proceedings

Issuing

Issuing

Issuing

SHERIFF'S COST

To service

Issuing garnishment

Attending verdict by Jury

Mileage

Costs for issuing interrogatories

Total cost

Levied on

Sold on

Returned to Court

GEORGIA, _____ COUNTY:

I have this day served the Defendant _____

personally with a true copy of the within petition and summons.

This the _____ day of _____, 19____

_____

Sheriff.

GEORGIA, _____ COUNTY:

I have this day served the Defendant _____

with a true copy of the within petition and summons by leaving same at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein.

This the _____ day of _____, 19____

_____

Sheriff.

GEORGIA, Dougherty COUNTY:

I have this day served the Defendant S.W.J. Inc.

a corporation, with a true copy of the within petition and summons by handing same in person to _____

Whit Woolsey, an officer of said corporation.

This the 16th day of Aug, 1971.

C. L. Crews

Dep Sheriff.

UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF GEORGIA

ALBANY DIVISION

ROBERT W. REYNOLDS, DISTRICT ATTORNEY, ON BEHALF OF THE STATE OF GEORGIA,	I	CIVIL ACTION FILE NO. 7296 IN THE SUPERIOR COURT FOR THE COUNTY OF DOUGHERTY, STATE OF GEORGIA
Plaintiff	I	
Vs.	I	FILED at 8:30 A.M.
S.W.J., INC.,	I	AUG 20 1971
Defendant	I	Deputy Clerk, U.S. District Court

Know all men by these presents that we, S.W.J., INC., as principal, and Frank Hedrick, as surety, are held and firmly bound unto Robert W. Reynolds, District Attorney, on behalf of the State of Georgia, plaintiff, in Civil Action No. 7296, Superior Court Dougherty County, Georgia, his successors and assigns, in the penal sum of $500.00 lawful money of the United States of America, for the payment of which well and truly to be made, we and each of us bind ourselves, our heirs, our executors and administrators jointly and severally by these presents.

The conditions of this obligation are that whereas the said S.W.J., INC. has applied by petition to the United States District Court for the Middle District of Georgia, Albany Division, for the removal of the above stated case from the Superior Court of the State of Georgia in and for the County of Dougherty, to the United States District Court for the Middle District of Georgia, Albany Division:

Now if the said S.W.J., INC. shall well and truly pay [illegible] costs and disbursements incurred by reason of said proceedings

should it be determined that the case was not removable or was improperly removed, then this obligation to be void, otherwise to remain in force and effect.

This 19th day of August, 1971.

S. W. Tyler (PRINCIPAL)

Fred H. Hilsid (SURETY)

The above and foregoing bond is hereby approved.

JOHN P. CONART, CLERK
UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ALBANY DIVISION

BY: Kathryn T. Campbell
KATHRYN T. CAMPBELL
DEPUTY CLERK
UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ALBANY DIVISION

APPENDIX M

Page

Albany Sunday Herald news article of Oct. 10, 1971, reporting on civil and criminal proceedings brought by the Dougherty County District Attorney against the exhibition of the film "Carnal Knowledge" at the Martin Theatres. 3

Sun., Oct. 10, 1971 — The Albany Sunday Herald—11A

'CARNAL KNOWLEDGE'

Film Seized Here At DA Direction

10-10-71

By SAM PRUITT
Herald Staff Writer

A special force of lawmen acting on orders of District Attorney Robert Reynolds and armed with a search warrant signed by Dougherty Superior Court Judge Asa Kelley Jr., Saturday launched a surprise raid on a local movie theater and confiscated the movie "Carnal Knowledge."

In addition, the theatre manager and projectionist were charged with misdemeanor violations of Georgia law and later released after posting $100 bonds.

The "R" rated movie stars Ann - Margret and reportedly includes several nude scenes of the actress and some profanity.

Merlin Twin Theatres manager T. J. Turlington and projectionist T. W. Gordon were charged with two counts each of violating a Georgia public indecency law prohibiting public displays of sexual acts or nudity; and a newly - enacted section including motion pictures, night clubs, plays, television productions or "other exhibitions of human conduct."

Reynolds said Saturday an additional civil complaint has been filed and a hearing before Judge Kelley is scheduled for 9:30 a.m. Wednesday.

The film was confiscated by Chief Deputy Sheriff Dick Brown and County Investigator Harold Murphy shortly before the first showing was scheduled to begin at 2:30 p.m., Reynolds said.

"Contraband"

Reynolds said the film was seized on the grounds that it is "contraband" and will be held as evidence for the January Dougherty County Grand Jury.

The district attorney said he hopes the courts "will clarify" the issue and promised "we will have a decision in the near future for Dougherty County."

Reynolds was seen viewing the movie Thursday night with his wife, but declined to comment on whether his presence was a part of the "investigation" or was personal.

Albany Martin Theatres manager Victor Allen said he would have "no comment" on the confiscation and charges.

Angry Comments

Scores of would - be movie goers were turned away from the blank big screen Saturday, and such angry comments as "What the hell's going on?" and "I knew we should have gone last night," were heard.

A re - run of "Airport" was showing adjacent to "Carnal Knowledge."

A Herald employe, unaware of the confiscation, went to see the movie Saturday afternoon and was told by a cute little ticket seller, "I'm sorry, but Carnal Knowledge is not showing today. The district attorney came and took our film away."

The film began Thursday at the Gillionville - Road twin theatre that has been called Southwest Georgia's most modern and luxurious theater.

The movie has been called "brilliant" by New York Magazine critic Judith Crist; "one of the best movies ever" by Liz Smith of Cosmopolitan Magazine, and New York Times critic Vincent Canby said he was "sorry to see it end."

"Sure," said the district

APPENDIX N

Robert W. Reynolds, District Attorney on behalf of the *State of Georgia v. Martin Theatres of Georgia, Inc.* (being a Petition for Injunction) in the Superior Court of Dougherty County, C.A. 7381

Papers included in Appendix	Page
Summons, issued Sept. 8, 1971	3
Petition for Injunction, field Sept. 8, 1971	4-6
Order to show cause on Oct. 13, 1971	6
Motion for Leave to Amend	7
Order allowing Amendment, dated Oct. 12, 1971	8
Motion for Summary Judgment, filed Oct. 12, 1971	9
Order to show cause on Nov. 30, 1971	10
Recognition and Agreement, dated Nov. 30, 1971	11-14
Albany Herald news article of Dec. 1, 1971, reporting District Attorney as saying that agreement was reached on the basis of U. S. Supreme Court's refusing to hear "I Am Curious (Yellow)" appeal on Nov. 9, 1971	15
Order of Dismissal in C.A. 7381	16
Order of Nol Pros in *Georgia v. Gordon and Turlington*, No. 23877	17

COUNTY, Ga.

Issued and Entered Docket Page

This ____ day of ____, 19__

Clerk

CLERK'S COST

Writ Service	$
To filing and docketing suit	
Copying and issuing summons	
Issuing ____ extra copies	
Entering ____ orders	
Filing ____ Pleas	
Docketing ____ Judgments	
Issuing ____ Subpoenas	
Entering verdicts	
Commissions to examine witness	
Entering Judgment ____ fi	
Recording Proceedings	
Issuing ____ fi fa	
Entering ____ fi fa on Docket's Dft.	
Entering ____ fi fa on Court Entry Dft.	

SHERIFF'S COST

To service ____ writs	
Serving garnishments	
Attending verdict by Jury	
Mileage	
Clerk's fee taking interrogatories	
Total cost	
Levies	
Endorsement	

STATE OF GEORGIA

Superior Court

CIVIL DIVISION

November Term, 19 73

SUMMONS

In Justice ____ Court

Verdict and Judgment

ORIGINAL

Robert W. Reynolds, District Atty.

vs.

Martin Theatres of Georgia, Inc.

Filed in office, this 6th day of September, 19 73

Clerk

Robert W. Reynolds
Plaintiff's Attorney,

No. 7383

GEORGIA, ____ COUNTY:

I have this day served the Defendant ____

personally with a true copy of the within petition and summons.

This the ____ day of ____, 19__

____
Sheriff.

GEORGIA, ____ COUNTY:

I have this day served the Defendant ____

with a true copy of the within petition and summons by leaving same at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein.

This the ____ day of ____, 19__

____
Sheriff.

GEORGIA, Douglas COUNTY:

I have this day served the Defendant Martin Theatres of Ga. Inc

a corporation, with a true copy of the within petition and summons by handing same in person to ____

Shirley Snow, an officer of said corporation.

This the 9th day of Sept, 19 73

C. L. Brown
Sheriff.
By

Shawnee Dasher
Atty.

1-9-74

7381

GEORGIA, DOUGHERTY COUNTY

TO THE SUPERIOR COURT OF SAID STATE AND COUNTY AND TO THE HONORABLE ASA D. KELLEY, JR., JUDGE THEREOF:

The petition of Robert W. Reynolds, District Attorney, on behalf of the State of Georgia, on information of Lynn Stout, Investigator for the Dougherty County Sheriff, brings this his petition and respectfully shows:

(1)

Martin Theatres of Georgia, Inc., defendant herein, is a corporation with an office, agent and place of doing business in said State and County and operates and does business under the name and style of Martin Twin Theatres, which is located at 1121 Gillionville Road, and Georgia Drive-In Theatre, which is located at 106 Johnson Road in Dougherty County, Georgia.

(2)

This petition is brought to abate and enjoin a public nuisance being conducted by the defendant by virtue of the following facts.

(3)

The defendant has exhibited motion pictures showing human conduct at said premises at 1121 Gillionville Road and 106 Johnson Road to members of the public and to the said Lynn Stout, which would be public indecency under Code Section 26-2011, if performed in a public place because defendant has shown, exhibited, and disseminated motion pictures showing various persons in acts of

(a) sexual intercourse

(b) lewd exposure of sexual organs

(c) lewd appearance in a state of partial or complete nudity

(d) a lewd caress or indecent fondling of the body of another person

(4)

Petitioner attaches hereto and makes a part hereof, Exhibit I, which are photographs of a cross section of the movie pictures which have been exhibited at said premises.

(5)

The local agent and manager for said defendant is Shelby Sanders, who has actual knowledge of the obscene nature of the subject matter of the motion pictures being exhibited on said premises.

(6)

The loud, vulgar and obscene motion pictures exhibited by defendant greatly tend to corrupt the morals of the public in general and the youth of this community in particular and petitioner has no adequate remedy at law, and equity should grant petitioner a temporary restraining order and a permanent injunction.

WHEREFORE, petitioner prays:

(1) That process issue requiring the defendant to be and appear and answer this complaint and that Shelby Sanders be served in person with a copy of this complaint.

(2) That a permanent injunction be granted for the restraint and abatement of the public nuisance existing on the premises at the Martin Twin Theatres at 1121 Gillionville Road and Georgia Drive-In Theatre at 106 Johnson Road and pending the trial of this case the defendant be temporarily restrained and enjoined from the continuance of said nuisance upon said premises.

Robert W. Reynaud
DISTRICT ATTORNEY

GEORGIA, DOUGHERTY COUNTY

Personally before the undersigned officer authorized by law to administer oaths appeared Lynn Stout, who after being first duly sworn, states on oath that the facts set forth in the above and foregoing petition are true and correct.

Lynn S. Stout

Sworn and subscribed to before me this 7th day of September, 1971.

Dorothy J. Maxwell
Notary Public
Dougherty County, Georgia

ORDER

The above and foregoing petition having been read and considered let the same be filed and let a copy of the petition along with a copy of this order be served upon the defendant in person.

The defendant is required to show cause before me at the Courthouse in Albany, Georgia, on the 19 day of October, 1971, at 9:30 o'clock A.M. why the prayer of the petitioner should not be granted and why the defendant should not be temporarily restrained from carrying on a public nuisance upon said premises pending the trial of this case.

This 8 day of September, 1971.

JUDGE, DOUGHERTY SUPERIOR COURT

IN THE SUPERIOR COURT OF DOUGHERTY COUNTY
STATE OF GEORGIA

ROBERT W. REYNOLDS, District Attorney,

Plaintiff

-vs-

MARTIN THEATRES OF GEORGIA, INC.,

Defendant

CIVIL ACTION FILE NO. 7381

MOTION FOR LEAVE TO AMEND

Plaintiff moves this court for leave to file an amendment to his complaint in the above entitled cause, said amendment being as follows:

(1)

Plaintiff amends paragraph 4 of the original petition by showing that since the filing of the original petition the defendant has continued to operate a public nuisance and on October 8th and 9th at the Martin Twin Theatres Number 2 did exhibit a motion picture to the general public entitled "Carnal Knowledge" which contains scenes of human beings engaged in sexual intercourse and in partial and complete nudity and Plaintiff does hereby make said motion picture a part hereof and attaches a copy of same hereto by reference, and makes same available to this Court, and Plaintiff further shows that the defendant operates the State Theatre in Dougherty County and on October 7th through October 12th the defendant exhibited and showed a motion picture entitled "Friends", which motion picture showed human beings partially nude and engaging in indecent fondling which constitutes a public nuisance.

Robert W. Reynolds
ATTORNEY FOR PLAINTIFF

Personally before the undersigned officer authorized by law to administer oaths appeared Lynn Stout, who after first being sworn says on oath that the above and foregoing facts are true and correct.

Lynn S. Stout

Sworn to and subscribed
before me this 12th day of
October, 1971.

Dorothy W. Worrell
Notary Public
Dougherty County, Georgia

ORDER

Read and considered. The above and foregoing amendment is hereby allowed and ordered filed.

This 12th day of October, 1971.

Grace C. Kelly
JUDGE, DOUGHERTY SUPERIOR COURT

CERTIFICATE OF SERVICE

I, Robert W. Raynolds, do hereby certify that I have served a copy of the above and foregoing amendment upon Thomas W. Malone, Attorney of Record for the defendant, by mailing a copy to him with sufficient postage to insure delivery..

This 12th day of October, 1971.

Robert W. Raynolds
ROBERT W. REYNOLDS

IN THE SUPERIOR COURT FOR THE COUNTY
OF DOUGHERTY, STATE OF GEORGIA

ROBERT W. REYNOLDS,

Plaintiff,

Vs. CIVIL ACTION NUMBER 7381

MARTIN THEATRES OF GEORGIA, INC.,

Defendant.

MOTION FOR SUMMARY JUDGMENT

Comes now the Defendant in the above-styled cause and moves the Court to enter, pursuant to Section 56 of the Georgia Civil Practice Act, (Ga. Code Ann. 81A-156), a summary judgment in favor of the Defendant on Count One of the complaint on the ground that there is no genuine issue as to any material fact and that the Defendant is entitled to a judgment on Count One of the Complaint as a matter of law.

This motion is based upon:

(a) The petition filed by Robert W. Reynolds on behalf of the State of Georgia.

(b) The depositions of Robert W. Reynolds; and Lynn Stout.

WHEREFORE, movant prays that this motion be sustained and that a summary judgment be entered in favor of Defendant on Count One of the complaint.

MALONE, DRAKE & MALONE

BY: /s/ THOMAS EM. MALONE
Attorneys for Martin Theatres of Georgia, Inc.

MALONE, DRAKE & MALONE
Attorneys at Law
[illegible]
ALBANY, GA.

IN THE SUPERIOR COURT FOR THE COUNTY
OF DOUGHERTY, STATE OF GEORGIA

ROBERT H. REYNOLDS,	:	CIVIL ACTION
Plaintiff,	:	FILE NUMBER 7 3 8 1
Vs.	:	
MARTIN THEATRES OF GEORGIA, INC.,	:	ORDER
Defendant.	:	

The above and foregoing Motion for Summary Judgment having been read and considered, it is hereby ordered that the same be filed, that a copy be served upon Robert H. Reynolds, District Attorney, as well as a copy of this Order.

The hearing heretofore scheduled to be held on October 13, 1971, at 9:30 o'clock A.M. is hereby continued until 10:30 o'clock A.M. on the 30 day of November, 1971, at which time the above and foregoing Motion for Summary Judgment shall be considered along with any other matter in this action which may appropriately come before the Court.

This 12th day of October, 1971.

[signature]
RUE E. ENTEN, JUDGE, DOUGHERTY
SUPERIOR COURT

I certify that prior to filing the above motion and order I served on the Plaintiff's Attorney a copy of the same by depositing a copy in the mail addressed to the Attorney at his office in the county.

10-12-71

[signature]
Attorney for Defendant

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IN THE SUPERIOR COURT FOR THE COUNTY
OF DOUGHERTY, STATE OF GEORGIA

ROBERT W. REYNOLDS, DISTRICT ATTORNEY, Plaintiff,	CIVIL ACTION FILE NUMBER 7361
VS	
MARTIN THEATRES OF GEORGIA, INC., Defendant.	RECOGNITION AND AGREEMENT

This recognition and agreement entered into this 30th day of November, 1971, by and between ROBERT W. REYNOLDS DISTRICT ATTORNEY, Dougherty County, Georgia, and MARTIN THEATRES OF GEORGIA, INC., in an effort to resolve disputed issues existing between them and in order to settle multiple matters pending in Courts both State and Federal;

WITNESSETH

WHEREAS, MARTIN THEATRES OF GEORGIA, INC. is not in the business of producing motion pictures and is totally and utterly limited to showing the films made available by the film-makers and does not control the content of any film whatsoever even though it desires to provide the members of the viewing public with the best motion picture entertainment which the film-makers make available, and in particular desire to bring wholesome family type entertainment to members of the viewing public, and

WHEREAS, ROBERT W. REYNOLDS is the duly elected and constituted District Attorney for Dougherty County, Georgia, and is charged with the duty and responsibility of representing the State in matters which come before the Superior Court of Dougherty County, Georgia, and

[illegible]

Frances Dale
Dep.

1-9-74

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Page Two.

WHEREAS, ROBERT W. REYNOLDS and MARTIN THEATRES OF GEORGIA, INC., recognize the question of determining what is obscenity beyond the constitutional protections and what is not obscene and therefore protected material is a difficult and involved question upon which even courts oftentimes disagree, and

WHEREAS, ROBERT W. REYNOLDS and MARTIN THEATRES OF GEORGIA, INC., further recognize that in the last analysis only a local jury can determine the question of obscenity concerning any given film, and

WHEREAS, ROBERT W. REYNOLDS and MARTIN THEATRES OF GEORGIA, INC. recognize the burdensome expense and court congestion which necessarily results from a trial by jury of the obscenity issue pertaining to any given film, and

WHEREAS, ROBERT W. REYNOLDS has caused the film "Carnal Knowledge" to be seized as being obscene and beyond the constitutional protections, and

WHEREAS, MARTIN THEATRES OF GEORGIA, INC. contends "Carnal Knowledge" is not an obscene film and that the members of the viewing public have a right to see said film and they have a right to exhibit said film for the viewing public in Dougherty County, Georgia, as said film has been exhibited throughout the State of Georgia as well as the United States of America;

NOW, THEN, in recognition of the above stated paragraphs, it is agreed between the parties as follows:

-1-

The film "Carnal Knowledge" will not be shown in Dougherty County, Georgia, until by judicial determination the film "Carnal Knowledge" is found to be "not obscene". The determination mentioned shall be by the Georgia court system.

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Page Three.

-3-

MARTIN THEATRES OF GEORGIA, INC. agree and pledges to the people of Dougherty County, Georgia, that the following regulations, based on existing film industry ratings, will be carried out to the best ability of MARTIN THEATRES OF GEORGIA, INC.:

1. No X rated films will be shown at any theatre operated by MARTIN THEATRES OF GEORGIA, INC. in Dougherty County, Georgia;

2. No R rated film will be shown as a double feature with a G or GP film;

3. No scenes from R rated films will be shown as previews at a G or GP film and;

4. No unmarried person under the age of 18 years will be admitted to an R rated film unless accompanied to the theatre by his or her parent or legal guardian;

5. MARTIN THEATRES OF GEORGIA, INC. will exercise their best efforts to determine the age of any person when in doubt as to age and will further permanently post at the front of the theatre a notice concerning the 18 year age limit for R rated films.

6. MARTIN THEATRES OF GEORGIA, INC. further agrees that it will exercise its best efforts in good faith to comply with all laws of the State of Georgia even though it is specifically recognized that the question concerning obscenity is a purely subjective question which will necessarily lend itself to differing points of view.

-3-

This recognition and agreement is in no way to be

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Page Four.

considered as a waiver of the rights of either party, but is to be construed as merely a statement of present intention of both parties' good faith effort to sensibly deal with involved and subjective questions considered herein, and shall not be construed as creating liability of any nature whatsoever on the part of either party.

ROBERT W. REYNOLDS, District Attorney

BY: [signature]
HARRY D. WIGHT
As Counsel for Robert W. Reynolds

MARTIN THEATRES OF GEORGIA, INC.

BY: [signature]
GEORGE M. MAYSON
Counsel for Martin Theatres of Georgia, Inc.

District Attorney, Theater Settle 'Carnal Knowledge'

12-1-71

By SAM PRUITT
Herald Staff Writer

An agreement has been reached between District Attorney Robert Reynolds and Martin Theatres operators in the obscenity controversy over the movie "Carnal Knowledge."

All litigation, both criminal and civil, has been dismissed against the theater chain and the confiscated film has been returned in exchange for the theater's agreement not to show any "X" rated films in Dougherty County; not to show "R" rated films on the same double - feature bill with a "G" or "GP" rated film; not to show "R" rated movies in previews at a "G" or "GP" rated film; and not to allow unmarried persons under 18 to attend "R" rated films unless accompanied by parent or guardian.

In addition, Martin Theatres agreed not to show "Carnal Knowledge" in Dougherty County "unless by a final judicial determination the film "Carnal Knowledge" is found to be 'not obscene'."

"Good Faith"

Reynolds said he feels that "the laws of Georgia are being complied with in Dougherty County as far as Martin Theatres are concerned," and added that "I feel Martin Theatres acted in good faith and will continue to do so."

Martin Theatres' attorney Tom Malone said he feels the agreement is a fair and equitable one "under the circumstances."

Both Reynolds and Martin Theatres said the agreement is "merely a statement of present intentions of both parties' good faith effort to amicably deal with involved and subjective questions."

In addition to its specific terms, Martin Theatres agreed to exercise its "best efforts to determine the age of any person when in doubt as to age and will further permanently post in the front of the theater a notice concerning the 18 - year - age limit for 'R' rated films."

Cases Dismissed

Reynolds said all legal action initiated by his office, including criminal and civil actions, has been dismissed and that "no further cases are pending against Martin Theatres in Dougherty County."

Reynolds said the agreement was reached on the basis of a recent Georgia Supreme Court ruling which held the film "I Am Curious Yellow" to be obscene.

The U.S. Supreme Court declined to review the Georgia court decision, thereby upholding the action, he said.

Malone said a Federal suit challenging Reynolds' actions has similarly been dismissed.

Reynolds ordered the film seized Oct. 9 and at a surprise raid on Martin Twin Theater, arrested manager T. J. Turlington and proprietress T. W. Gordon on charges of violating a Georgia public indecency law.

Similar Actions

Reynolds said similar anti - obscenity actions brought by his office against 2W7 Inc., operators of Broad Avenue Cinema, have been dismissed in civil court here, but that misdemeanor criminal charges will be "disposed of" in the January term of Dougherty Superior Court.

Attorneys for 2W7 Inc. have dismissed a challenge to Reynolds' authority in the case filed in U.S. District Court here, he said.

"The Broad Avenue Cinema is now operating in compliance with the laws of the State of Georgia," Reynolds said.

Asked if he plans further anti-obscenity moves, Reynolds replied that "This (movies) is the only area of obscenity that I've received grand jury instructions in, but if any citizen has any information concerning obscenity of any type, I'm sure the January grand jury would like to have it."

A grand jury earlier this year urged Reynolds to strictly enforce a newly - enacted Georgia anti - obscenity law.

His subsequent investigations, arrests and film seizures stirred a storm of controversy, with supporters applauding his actions and critics accusing him of trying to censor adult materials.

288

IN THE SUPERIOR COURT FOR THE COUNTY
OF DOUGHERTY, STATE OF GEORGIA

ROBERT W. REYNOLDS, DISTRICT ATTORNEY,	:	CIVIL ACTION
Plaintiff,	:	FILE NUMBER 7301
Vs.	:	
MARTIN THEATRES OF GEORGIA, INC.,	:	ORDER OF DISMISSAL
Defendant.	:	

Upon oral motion made by the parties to the above referenced cause, and consideration of the recognition and agreement which has been entered into between the parties, it is hereby ordered that the above-styled action be and the same is hereby dismissed.

The Sheriff of Dougherty County, Georgia, is hereby authorized and directed to return to MARTIN THEATRES OF GEORGIA, INC. the reels of film comprising the moving picture "Carnal Knowledge".

This 30 day of November, 1971.

Judge, Dougherty Superior Court

GEORGIA, DOUGHERTY COUNTY.
I HEREBY CERTIFY that the above and foregoing is a true copy of the original filed in this office.
EVANS B. HINSON, Clerk
By Evans Hinson Dep.
Date
1-9-74

WITNESSES FOR THE STATE

The Defendant

Mpsc

No. 23327

SUPERIOR COURT

DOUGHERTY COUNTY

Term, 19 74

THE STATE

vs

Leo J. Harden and

T. Lambright

and Calvin Cook Godfrey

24-3112 24-3104

ACCUSATION

ROBERT V. REYNOLDS,
District Attorney.

Filed in office this 7th day of Oct. 1974

Clerk

The Defendant

as being formally arraigned, entered

said by Jury and pleads guilty.

This day of

19

District Attorney

Defendant's Attorney.

Verdict

We the Jury find the Defendant

guilty.

This day of

19

Foreman

on motion of D.A. within accusation is hereby nol prossed
10-21-74

Agnes H. Kelly
Judge

Read

Emanuel Rad
Dep.

1-9-74

APPENDIX O

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Albany News Article of Feb. 8, 1972 Reports District Attorney Petition for Adversary Hearing.	3
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'Carnal's' Back

D. A. Seeking To Block Award Movie Third Time

2-7-72

By JAMES H. [illegible], JR.
Herald Staff Writer

District Attorney Robert Reynolds today moved [illegible] to prevent a third Albany showing of the award-winning movie, "Carnal Knowledge."

Albany is the only city in the nation to act officially against the film.

Reynolds filed a petition on behalf of Dougherty County Investigator Lynn Stout with Dougherty Superior Court Judge Asa D. Kelley Jr. for an adversary hearing after the owners of Broad Avenue Cinema announced yesterday that they had rescheduled the film for an engagement beginning Wednesday.

Last month, Reynolds had seized the movie, had it shown to the Dougherty Superior Court Grand Jury, and had obtained four indictments against the owners, a projectionist and ticket seller on grounds of allegedly violating Georgia obscenity laws.

Action Blocked

But the theatre owners blocked this action by alleging in a motion to suppress that the seizure of the film was unconstitutional because a prior adversary hearing before a magistrate had not been held.

Judge Kelley so ruled and ordered the seized film returned to the theatre owners.

The petition filed Monday alleges that there is probable cause that the film violates the Georgia obscenity code.

The petition alleges that the "film contains scenes of . . . lewd states of nudity and indecent fondling. . ." Stout urged that the court make a judicial determination as to whether or not the film is obscene."

Seek Hearing

The petition also requested that the court issue an injunction restraining the defendants from exhibiting the movie publicly until a hearing can be scheduled.

Judge Kelley has not yet set a date for a hearing.

"Carnal Knowledge" has been shown throughout the nation, has grossed more than $20 million and has been nominated for seven awards by the Motion Picture Academy of Arts and Sciences.

So this is where the public came in — as they say at the movies.

The first "bust" of "Carnal Knowledge" was made Oct. 11 at the Martin Twin Theaters. But an agreement was reached between Reynolds and Martin Theaters whereby charges were dropped after the management agreed not to show the movie in Dougherty County "unless by a final judicial determination the film is found not to be obscene."

Brave Tornado Alert

Wendell and Jenkins later attempted to show the critically - acclaimed film in Albanians, and again the law intervened last month. The only persons who got a chance to look, aside from the 176 patrons who braved tornado warnings and torrential rains for the first showing, were the members of the grand jury.

Now the film has been returned.

Now the theater operators are once again offering Ann Margret & Co. for public consumption.

Missing 'Carnal' Ordered Seized by City Court Edict

2-9-72

By DAVID FULLER
Herald Staff Writer

At an adversary hearing in City Court today, Judge Pro Hac Vice William T. Jones signed an order authorizing County Sgt. Lynn Reed, to seize the movie "Carnal Knowledge" "if it can be found."

Charles Hatcher, attorney for the defendants, Walt Wendell and Billy Jenkins, owners of the Grand Avenue Cinema, said the defendants did not have the film with them in court. Hatcher refused to guess the court's showing of the film until counsel, Peter Bank Gem, could be present.

Hatcher said Gem was not able to be present today because he is trying a capital case in Gwinnett County Superior Court.

Applies For Hearing

Dist. Atty. Robert Reynolds had applied for an adversary hearing to determine judicially whether the film was obscene, violated the state's obscenity laws, and could be seized.

Reynolds' application for the hearing came after Gwinnett Superior Court Judge Ana S. Kelley ruled last week that a previous seizure of the film was illegal because an adversary hearing had not been held prior to the confiscation.

When Hatcher asked for a clarification of what was expected of the defendants at the hearing today, Reynolds was sworn in and took the stand.

Reynolds said that he had filed an application for the hearing with Judge Kelley [illegible] but was told not heard from the judge by the next day, he filed the application with Jones.

"All-Day War"

Reynolds said that Gem called him at 11 p.m. Tuesday and told him he (Gem) had declared "all-out war" on the D.A. Reynolds added, "I'm tired of being called a dictator and a censor."

Reynolds also said that Gem came to his office Monday and asked what the district attorney's feelings were on the film so he could tell his client.

Hatcher presented a motion for a continuance until Gem could be present, but the court denied the motion.

Hatcher explained his motion by saying that the defendants were informed of the hearing less than 24 hours before it was to be held, and they did not have time to call witnesses and collect evidence.

Give Conditions

Reynolds said he would agree to a continuance on the condition that the court be allowed to view the film, and that the movie be held until Gem could be present for a hearing.

The district attorney argued that if the theater owners were allowed a continuance and allowed to show the film, they would be interviewing viewers as potential witnesses. He added that one defendant owns a local radio station, and both have "great influence with the television station."

Hatcher said that the defendants would not waive their constitutional right to be free of prior restraint, and cited cases in Atlanta where movies continued to be shown while the courts conducted the hearings.

Reynolds said that "they want to continue showing it (the film), hoping that your honor will forget about it."

Denies Court's Power

Hatcher then presented another motion stating that City Court is without power to conduct such a hearing. Jones denied the motion, saying that if the court was empowered to sign search warrants then he felt it had the right to conduct the adversary hearing.

Hatcher told Jones that the defendants did not have the film present for showing today, and they did not intend to show the movie until the hearing ceased could be present.

Reynolds, still under oath, [illegible]

Carnal Knowledge' Placed Under Permanent Ban Here

2-10-72

By JAMES H. GRAY JR.
Herald Staff Writer

As far as the judiciary appears concerned, the movie "Carnal Knowledge" is permanently banned in Albany unless and until the owners of Broad Avenue Cinema get it lifted by some legal means.

Following a hearing in City Court here Wednesday before Judge Pro Hac Vice Allen T. Jones, the movie was seized at Broad Avenue Cinema Wednesday afternoon. Theater owners Billy Jenkins and Whit Woodall were charged with violation of Georgia's obscenity laws.

★ ★ ★ ★ ★ ★

'Sorry, Folks, The District Attorney Has Decided You Are Not Mature Enough to See . . .'

2-10-72

By VIC SMITH
Herald City Editor

The sign on the ticket window read: "The admission charge — contributions inside to help combat local prosecution."

A steady stream of persons — some young, some old, some bearded, long - haired and side - burned, some nude, some dressed, some black, some white, some hippies, some "straight" — moved quietly into the theater.

Another Try

It was nearly 2 p.m. on Wednesday, Feb. 9, 1972, and the scene was Broad Avenue Cinema, in the heart of downtown Albany. The occasion was another try — ostensibly the umpteenth try — to show the movie "Carnal Knowledge" to the general public.

It wasn't, of course, to be — courtesy of Mr. Robert Reynolds, Dougherty County District Attorney.

"Have the 'heavies' come yet?"

This was a question in the lobby of the theater shortly before the appointed time for showing the movie.

"No, but they'll be here."

A black man, but, predominantly, strolled in.

"How much," he asked theater co-owner Billy Jenkins, "do we put in the pot?" He referred to a cardboard box over which "censorship contributions" were being dropped.

"Anything You Want"

"Anything you want to," said Jenkins, as the box passed him. It was less the lobby. "You probably won't get to see all of it, anyway."

"Won't get to see all of it?"

"Probably not — I hope you do."

Without further comment, the man went inside and took a seat.

Then the time came for the showing. The signal was given, and a muted, almost full - house audience settled down a bit nervously.

On the screen came the preliminaries — producer, director, cast, etc., etc. Nothing happened.

Then the picture came on. And it went on, until just as the plot seemed to be developing. About 20 minutes after the start.

Screen Dark

Then, the screen went dark. The lights came on.

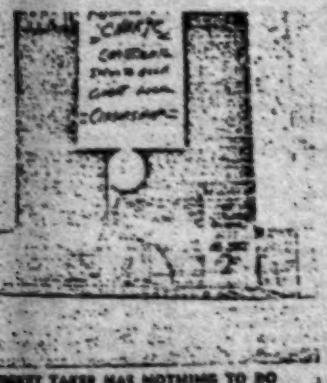
Jenkins stepped to the rear of the theater and said:

"Sorry, folks. The District Attorney has decided you are not mature enough to see this picture."

The crowd filed out, quietly, to mull about outside the building, watching and wondering.

Two County "investigators" — cops by any other name — appeared, carrying the film reels of the movie.

They invited Jenkins and co - owner Whit Woodall to accompany them to the sheriff's office. Jenkins and



...KET TAKER HAS NOTHING TO DO
...ge Encourages Combatting Censorship

AND AWAY IT GOES: Sheriff's investigator Wayne Parrish in... ing Broad Avenue Cinema with the film "Carnal Knowledge" in hand... watched without comment after the movie was seized Wednesday af... theater owners Billy Jenkins and Whit Woodall arrested. An attorney... of the film to a near-full house was interrupted after about 20 minute... (Herald Staff Photo by ...

'CARNAL KNOWLEDGE' TRIAL BEGINS HERE

A Dougherty Superior Court jury of one white woman, two black men and nine white men was struck by noon today to try the issue of whether the movie "Carnal Knowledge" is obscene.

In a surprise move just before the jury selection was completed, District Attorney Robert Reynolds elected not to prosecute one of the owners of the Grand Avenue Cinema, Walt Woodall. That left on the sole defendant the theater manager and operator, Billy Jenkins.

Reynolds' decision was designed to simplify the case and prevent the central issue to swirl around it simply as possible to the jury, in deciding whether or not Jenkins is guilty or innocent of "distributing obscene materials" by exhibiting the movie publicly, the jury will, in effect, decide whether "Carnal Knowledge" is obscene or not.

Show Made

The district attorney said that the movie would be shown to the jury this afternoon as part of the State's evidence.

In his exhaustive questioning of the jurors, leading defense counsel Peter Zack Geer endeared that the defense was prepared to introduce an "expert" to give his views on the film's intrinsic value.

Judge Ava D. Kelley, in givent the jury and court only a one-hour lunch break, promised that he would try to conclude the case today. It is expected to run into the evening hours.

Entering the uniformly dull questioning of each individual juror by the defense, which proceeded from 9:30 a.m. until shortly after noon, was the request of one male member

Carnal

(Continued from Page 1)

of the panel.

Geer inquired of the juror if he had "ever seen any scenes in movies that wouldn't be seen on the streets."

"That depends on what streets," came the laconic reply as the courtroom erupted into laughter.

Jenkins alone now faces the March term Grand Jury indictment that he "did knowingly exhibit a motion picture to the general public which contained conduct showing (a) an act of sexual intercourse; (b) a lewd exposure of the sexual organs; (c) a lewd appearance in a state of partial or complete nudity; (d) a lewd, sexual or indecent fondling of another person."

Central Issue

District Attorney Robert Reynolds, who led the film sound after it ran about 20 minutes at Grand Avenue Cinema here Feb. 9, said the central issue in today's case is a "jury determination of whether or not the movie 'Carnal Knowledge' is obscene within the meaning of Georgia statutes."

Prolonged questioning of prospective jurors revealed all of the normal shadings of the case, and there were frequent verbal clashes between chief defense counsel Peter Zack Geer and Reynolds.

One exchange provoked a stern admonition from presiding Judge Ava D. Kelley Jr., who warned there would be no conversations between opposing attorneys and that questions, differences and so forth would be directed to the bench.

Judge Firm

"I am not going to have any other procedure," the judge declared.

The judge at one time cautioned Geer concerning the attorney's "side remarks."

For the first hour and a half after court opened at 9 a.m. opposing counsel questioned prospective jurors at great length. Geer was particularly detailed in his examinations, asking if the jurors had seen "Carnal Knowledge," querying them as to church affiliations, and as to whether or not they had made up their minds about the movie on their "personal opinions" or if they would decide the case on its merits under Georgia law, which would be given to them in charge by the court.

Geer's Questions

Geer wanted to know if jurors would "view certain scenes of the movie as overriding factors" in their judgment, or whether they would judge the movie in the light of its "whole thrust," or "total impact."

During the questioning, three women were excused "for cause." They had seen the film. One elderly man was excused because of deafness.

One woman who had seen the picture said that it "offended" her all the way through the showing. She said it "had no message," or that if it had it was a "negative message." The language used in "Carnal Knowledge" made her "feel uncomfortable," she said.

11-to-1 Split Holds Firm

'Carnal Knowledge' Jury Deadlock Sparks Mistrial

By JIMMY ROBINSON
Herald Executive Editor

3-31-72

A mistrial was decided at 12:15 p.m. today by Dougherty Superior Court Judge Ann D. Kelley Jr. after jury which deliberated for more than eight hours Monday and today reported itself deadlocked at 11-to-1 in the "Carnal Knowledge" case.

The issue which the jury failed to resolve was the guilt or innocence of Broad Avenue Cinema Manager Billy Jenkins, charged with "distributing obscene material" in exhibiting the Ronald Ellis that constitutes an artistic commentary on the American concept of sex.

Hanging Five

But the deeper issue still hanging fire is whether "Carnal Knowledge" is obscene within the meaning of the 1971 act of the Georgia General Assembly.

Monday's trial, pressed to completion by Judge Kelley, required 10 hours. The jury first reported its 11-to-1 deadlock before 11 p.m., and this morning shortly before 11 o'clock, advised the court that it still could not make a verdict.

Finally, just before court recessed for lunch, Judge Kelley declared a mistrial after Foreman Jack Thomas reported the 11-to-1 deadlock had not been broken.

May Trial Soon

District Attorney Robert W. Reynolds, who three hours has named "Carnal Knowledge" in Albany, said in the wake of the mistrial declaration that he would not a new trial in the May term of court.

It is also city in Georgia, or anywhere else in the United States, has the movie been the basis of any legal action.

The showpiece of the State's case was the movie itself.

To view it, the entire court retired to the Broad Avenue Cinema, from which "Carnal Knowledge" was taken seized by District Attorney Reynolds in January and February.

BULLETIN

District Attorney Robert Reynolds announced after noon today that a retrial of the "Carnal Knowledge" movie case would begin Wednesday morning at 9 a.m. Previously Reynolds had said he would retry the case during the May term of Dougherty Superior Court.

It was the first time that he had so moved his court, Judge Kelley remarked, wistfully recalling that the theater was the scene of his boyhood viewing of the deeds of derring-do of the likes of Tom Mix, Hoot Gibson, Ken Maynard, Buck Jones et al of the Western pantheon of sun-parcels.

Jury Sequestered

By court order, the jury was strictly sequestered in the theater. Other court personnel, the press and those in attendance as spectators at court, were kept at least five rows from the jury, and deputies had strict orders from the court to arrest anyone seen approaching a juror for any purpose. None did.

Following the showing, which provided a welcome two-hour stroll in the sunshine for the jury and the court, the State tendered the film in evidence. And that was its entire case, except for the testimony of Sheriff's Investigator Lynn Wood, who related how he made four arrests at the Broad Avenue Cinema and seized the two reels of film of "Carnal Knowledge" last Jan. 13. The grand jury indictment was based on this incident, not a later seizure Feb. 8.

Three Witnesses

The defense had but three witnesses, Mrs. Jean Daugherty, a ticket seller for the theater, who told of buying Playboy and other magazines featuring broad expanses of nude feminine flesh; Terry Kay, motion picture critic of the Atlanta Journal, and the defendant himself.

Defense counsel Geer, through the use of Mrs. Daugherty, said he desired to show "community standards" in Albany as defined by the Georgia Code. District Attorney Reynolds objected strenuously, and after lengthy arguments, the objection was overruled. After that, Mrs. Daugherty testified to buying Night and Day, Flesh, Stare, Penny and National Star Chronicle at City News Stand, whereupon Geer then introduced in evidence a box full of "girlie" magazines without objection from the State.

Geer Overruled

Under cross-examination, when Reynolds attempted to show scenes from such motion pictures as "Tobacco Road" and "Southern Comfort" and "Sweet Bird of Appetite" and "Midnight Phoning" to the witness, Geer objected immediately, but the court ruled that the district attorney had an equal right to inquire about community standards. However, Mrs. Daugherty testified she had seen none of the films in question.

Kay, testifying as an "expert" in his field after an exhaustive legal bout between attorneys, said that "Carnal Knowledge" depicted the destruction of personalities, in one case due to a change of philosophy of an individual. The movie, he said, was a "study in contrasts," and that to him had engendered a "great feeling of disgust." The moral of the movie, Kay said, was that "sexual depravity leaves man without any values." The movie "disgusts more than it arouses," he testified, and "destroys the myth of sex" as the be-all and end-all of American society as depicted in so much of the modern advertising."

Jenkins Statement

In his unsworn statement to the jury, permitted under Georgia law, Jenkins said that in 20 years in the theater business, he had played all types of movies and cited a change in the audience appeal of films in general. He said he had no knowledge that "Carnal Knowledge" was obscene, that it ranked among the 20 best films of last year, that star Ann-Margret had been nominated for an "Oscar," and that the film had played in 20 other Georgia cities without any legal incident whatsoever. Among those he listed Columbus, Valdosta, Douglas, Moree, Savannah, Statesboro, Augusta, Dalton, Cedartown, Atlanta, Rome and others. It is booked in Candler March 31, he said.

Following the close of testimony, Geer moved for a directed verdict on behalf of his client, chiefly on the grounds that no evidence had been introduced that Jenkins actually had exhibited the movie, but this was easily overruled by Judge Kelley.

The heart of both the prosecution and defense lay in the often perfervid arguments of the opposing counsel in their closing summations.

"Slap" of Art

Reynolds said he was "glad" the 1971 act was on the Georgia lawbooks and pledged to enforce it to the best of his ability. He said he had long been "trying to get a ruling from a jury on what kind of community standards we are going to have in Albany." He told the jury: "You ought to stop it (obscenity) in this county," adding, "We're going to stop it this community what we can't do out in front of this Courthouse."

Disclaiming any "personal interest in this verdict," the district attorney said that "later on if this community wants to do something about that (a reference to the girlie magazines), I'm ready."

He scored the defense contention that "Carnal Knowledge" had "redeeming social value" as required both by a U.S. Supreme Court decision and by Georgia law, and cited its effect on 16-year-olds in particular. Answering a defense contention that a banning of "Carnal Knowledge" had made Albany "the laughing-stock of the nation," Reynolds said the jury: "Be the laughing - stock but stand up for your convictions."

The purpose of movies like "Carnal Knowledge," the district attorney declared, "is to draw youth like a magnet to love the almighty dollar." This, he concluded, was "a landmark case" and the jury's verdict would provide "a guideline for the future" in Albany.

Geer Summation

Geer, in his summation, said he had "seen women walking on Pine Avenue right out yonder without bras and in hot pants, but I didn't go out to the TV station and make a speech about it; it's not any of my damned business. I don't like it, but it's your community standard."

He stressed that "Carnal Knowledge" did not feature any "belly dancing, but you can go to Joe Peach's a lot of nights and see that." Peach is operator of Joe's Cellar, a local night spot.

Summoning his finest hermetic flourishes, Geer thundered: "You can't legislate morals; neither the United States Congress nor the Georgia General Assembly can do that. You only get morality from inside of yourself."

He strongly suggested that "Carnal Knowledge" was comparable to a medieval morality play, and said that the movie appeals not to "prurient interest" — another Supreme Court definition — but rather precipitates an almost universal disgust.

Civil Rights

Even so, he said that "people have a right to see this movie; it is one of our basic freedoms in the Constitution . . . The freedom of expression today is on film; people don't bother to read any more."

Finally, Geer said it is the test that Albany alone among the cities of the entire country has

The Albany Herald

City Life

In Greater Albany

Second Film Trial Opens

1-23-72

The federal movie "Carnal Knowledge" had its second day in Dougherty Superior Court today -- the second this week. And it.

The first trial of the State's defense motion to have the of Georgia vs. Billy Jenkins, "Carnal Knowledge" jury taken president and manager of Bond to see "Each Good Friends" at Avenue Cinema, charged with le Martin Twin Theater. "distributing obscene material," ended in a mistrial yesterday.

However, defense counsel Grier said he hoped to introduce in evidence the testimony of witnesses who had viewed "Each Good Friends." He said his object would be to set forth "community standards" which the U. S. Supreme Court has ruled is one of the criteria al- owing "obscenity" decisions.

Prosecutor Rodney

The jury, which took the case early Monday night after a 30- hour trial, reported itself deadlocked at 11 to 1 by 11 p.m. Monday, advised the court in mid-morning Tuesday that it had not changed, and finally was dismissed with a mistrial declaration by Judge Asa D. Kelley Jr. at 12:15 p.m. yesterday.

Reportedly, the majority favored conviction, a verdict which would have had the effect of ruling the movie "obscene" within the definition of a 1971 act of the Georgia General Assembly.

The retrial of the case was scheduled suddenly yesterday afternoon when, District Attorney Reynolds told The Herald, defense counsel Peter Zack Geer agreed with the D. A. that the earlier the issue is settled, the better.

By 10:30 a.m. today, a jury had been struck -- this ten alternate, with 10 whites and two blacks.

The "Good Friends"

The defense failed in an effort to subpoena the X-rated movie, "Each Good Friends," starring Dyan Cannon and now appearing at Martin Twin Theater. Judge Kelley ruled that a defense subpoena, issued late yesterday, did not provide sufficient time.

The judge also ruled against

After an early lunch today, the new "Carnal Knowledge" jury trekked to the Bond Avenue Cinema to see the showing of the film as the State's prize exhibit.

Presumably, too, Judge Kelley, who praised opposing counsel for a conclusion of the trial in one day Monday, even including a 30-35 recess which kept the jurors in court more than 12½ hours, would do so again today.

Second Jury Finds Movie Carnal Knowledge Obscene

3-24-72

By JAMES H. GRAY JR.
Herald Staff Writer

A Dougherty Superior Court all-male jury Thursday finally returned a guilty verdict in the case of Billy Jenkins president and manager of the Bond Avenue Cinema, charged with "distributing obscene material".

Jenkins was fined $750 and ordered to one year on probation by Dougherty Superior Court Judge Ann D. Kelley Jr. for showing the nationally-released R-rated movie "Carnal Knowledge" at his theatre.

Defense Attorney Peter Zack Geer charged that the proceedings constituted another "Keystone Monkey Trial" and that the decision was a "disgrace to the back of freedom in Dougherty County."

Intends to Appeal

Geer added that he was dissatisfied with the verdict and intends to appeal the conviction to the Georgia Supreme Court.

The attorney said that "supposedly the jury missed the whole point about freedoms guaranteed under the First Amendment" and that as far as he could tell "District Attorney Bristol, Ogeechee, never thought the First Amendment was involved."

Geer cited a Supreme Court ruling which held that "nudity and naked men is not obscene," here maintained. In their decision that "obscenity is in the eye of the beholder."

Second Jury

The second jury to hear the case and charged by Judge Kelley to return a verdict deliberated nearly 24 hours before reaching a decision. They reported themselves deadlocked at 7-5, then 9-3, and 11-1 before returning the guilty verdict.

Another jury had considered the case for nearly four 24 hours, Monday and Tuesday before reporting itself hopelessly deadlocked at 11-1.

Republic had no comment on the outcome of the trial.

APPENDIX P

Page

State Statutory Standards
Dealing with Offenses Against
Morality and Decency
Arranged by State and Topic..... 2-16

OBSCENITY	LEWDNESS	INDECENCY Indec. Ex.	NUDITY	MORAL NUISANCE	OBSCENE LANGUAGE	ADULTERY	FORNICATION	SODOMY	INCEST	Pander Pim
					ALABAMA					
Title 14 Chapter 84 14-370, et seq. Seizure, Presump. 14-374 (2) Obscene defined: "...lewd, lascivious, filthy and pornographic and that to the average person, applying contemporary community standards, its dominant theme taken as a whole appeals to prurient interest." 14-374 (1)	7-1981	Exposure: 14-326 (1) Enticing child for immoral purposes 14-326 (3)	Nude Pictures 14-374	Equity Action 14-374 (5) Obscenity: Injunc. 14-374 (7) Nuisance: "lewdness, assignation or prostitution" 7-1981	Before Women 14-11	14-16	14-16	14-336	14-323 et seq.	14-331 et seq. Pandering 14-330
					ALASKA					
Const. Books 11.40.370	Incest children 11.15.134	Exposure: 11.40.100 Contrib. to delinq. of child 11.40.110 Delinq: "immoral..., obscene,... vulgar.... indecent,... 11.40.150 Incorrect genic laws 11.40.170			Solicitous: 11.45.035	11.40.060 et seq.	11.40.040	11.40.120	11.40.130	11.15.130 et seq. 11.15.134 et seq.
Defn: "Sexually indecent...adultery, homosex., sodom., masochism, perversions, lewd, lascivious, suggestive, amorous embraces, kissing etc. breasts or genitals exposed" 11.40.170 (6)										
					ARIZONA					
13-531 et seq., Minors 13-535 Many Related 13-601.01 Obscene defined: "that which considered as a whole has as its dominant theme or purpose an appeal to prurient interest or a shameful or morbid interest in nudity, sex or lewdness going substantially beyond customary limits of candor in description or representation of such matters and is utterly without redeeming social importance." 13-531.01	13-651 et seq. 13-652 13-901 et seq.	Same obscenity	Motion picture depicting nudity banned 13-536	Nuisance: "indecent or offensive to senses" 13-601 Obscenity: Injunction 13-535	Language 13-377 Obscene song: 13-378 Intemperate 13-995	13-221 et seq. Incestuous Adultery 13-471	Open and notorious 13-322	13-651 13-652	13-471 25-101	13-10 et seq. Pandering 13-535 13-10 et seq.
					ARKANSAS					
41-2719 et seq. 41-2701 et seq. Defn: "obscene, vulgar, indecent" 41-2704 "matter of obscene character to the person" 41-2704 Minor under perscrip.: 41-2727 Sale to minors 41-2722 Obscene defined: "If, the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." 41-2701 (1)	Same obscenity	Exposure: 41-2711 Indecency: 41-2701 Before children 41-2127	Nudism: 47-2709 et seq. "Public exhibition of nudity" 41-2711 "private parts exposed or in service of others" 41-2709	Injunc. 41-2721 41-2719 Action in Chancery Court. 41-2717 Nuisance, equity cases 34-101 et seq.	41-1408	Divorce grounds 34-1212	Charge of, in slander 41-2457	41-813 41-814	41-811 13-102 et seq.	41-128 et seq. Pandering 41-127

OBSCENITY	LEWDNESS	INDECENCY (Indec. Ex.)	NUDITY	MORAL NUISANCE	OBSCENE LANGUAGE	ADULTERY	FORNICATION	SODOMY	INCEST	PROSTITUTION
					CALIFORNIA					
Penal Code §§ et seq. Arrest records of persons of juvenile, minors or inmates having place PC 851.5	PC 311, 311 1/2 PC 11225 et seq. Registration of offenders PC 290	Obscene live conduct PC 311.6 Acts encouraging obscenity PC 650 1/2 Indecent Exposure PC 314 Indec. Exhibition... children participating Lab 1308	Topless waitresses and entertainers Penal Code See obscenity, PC 311 (a)	Nuisance: "lewdness, assignation or prostitution...." PC 11225 Nuisance: "indecent or offensive to the senses." CC 3479 Public nuisance: "indecent" CCP 731	Vulgar, profane or indecent PC 415 same 311.6	PC 269a 269b	Cohabitation PC 269a 269b	PC 286 288 A	PC 285	Penal Code 647 Nuisance PC 11225
Obscene defined:	"when as a whole, the predominate appeal of which to the average person applying contemporary standards, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion; and is matter which taken as a whole goes substantially beyond customary limits of candor in description or representation of such matters; and is matter which taken as a whole is utterly without redeeming social importance." PC 311 (a)									
					COLORADO					
40-9-18 et seq. Nuisance against D.A. 16-9-21	40-9-15 (see indecency)	Indecent liberties 40-9-32 Lewd display or monstrous act of public indecency 40-9-15		Nuisance: "lewdness, assignation, or prostitution" 38-13-2 Injunction: 40-9-22 40-7-105		40-9-1 et seq. 40-6-501	40-9-3 40-9-15	Loss of civil rights 39-10-10	40-9-4 et seq. Disqual. for civil rights 39-10-10	40-9-15
Obscene defined:	"means...lewd, or indecent, or lascivious...or other representation..., of an immoral or indecent nature...pictures of men or women in unnatural attitudes or positions...indecent or immoral details of crime, vice, or immorality, to corrupt public morals, or to offend common decency...or to make ...immorality and licentiousness attractive..." 40-9-17									
					CONNECTICUT					
53a-193 et seq. Minors 53a-196 Material harmful to minors 53a-197 Obscene defined:	53-185 et seq.	53a-82 et seq.	Nudity defined: 53a-193 (2) See obscenity defn. 53a-193	Nuisance: "lewdness, assignation, or prostitution" 19-335 Obscenity: Injunction 53a-196 53a-200	(repealed)	53a-81	(repealed)	Penal Code 76 et seq.	53a-291	Penal Code 83 et seq.
"...(1) considered as a whole, its predominant appeal is to prurient, shameful or morbid interest in nudity, sex, excretion, sadism or masochism, (2) it goes substantially beyond customary limits of candor in describing or representing such matters, and (3) it is utterly without redeeming social value." 53a-193										
					DELAWARE					
11-711 et seq. Minors 11-636 et seq.	Defined 11-731		Nudity defined: 11-4100 (e)	"social vices" Nuisance: 10-7111 et seq. Nuisance: "lewdness, assignation, or prostitution" 11-7107 Obscenity: Restraining order in Chancery 10-439 a		11-171 11-531 11-821 Custody of Rus. issued by. 13-744	11-531 11-821 832		11-531 24-1799	11-731 et seq. 10-7101
Obscene defined:	"...horror, lewd, lascivious, filthy, shameful...or obstruction of decency in manner or purpose..." 11-711									

OBSCENITY	LEWDNESS	INDECENCY Indec. Ex.	NUDITY	MORAL NUISANCE	OBSCENE LANGUAGE	ADULTERY	FORNICATION	SODOMY	INCEST	PROSTITUTE
				DISTRICT OF COLUMBIA						
22-2001 et seq. 47-2351 Obscene defined:	22-2713 Lewd, indecent or obscene acts 22-1112 Nuisance 22-2713	22-1112	Not searched	Nuisance "lewdness, assignation or prostitution 22-2713		22-301			22-1901	22-2701 et seq. Nuisance 22-2713
				FLORIDA						
847.011 et seq. Nuisance: 823.05 Minors: 847.013 Exterior Presentation 847.011 (1) (b) Obscene defined:	Defined: 796.07 847.011 Children and minors 847.012 .013 License revocation, seizure of 870.10	Exposure: 800.02 .03	Nudity defined: 847.013 (a)	Obscenity: Exhibition: 847.011 (1) (a) Nuisance: "injurious to the morals, prostitution, assignation, lewdness, games of chance... 823.05 Obscenity: Exhibition: 847.011 (1) (a) Pre-emption of legislature 847.011	847.05 Penal code: 231.28 Open profanity 847.04 Indecent language 345.10	798.01 798.04	798.03 .04 Female children and minors 794.05 .06	800.01 .02	741.23	796.07 et seq. 823.05 Nuisance 96.1 et seq. Exterior Pre. 847.011 (1) (b)
	"...obscene, lewd, lascivious, filthy, indecent, sadistic, or masochistic..." 847.011 (1) (a)									
				GEORGIA						
26-2101 et seq. Minors 26-9905a Pandering as separate crime 26-2101 (4)	26-2011	Public indecency 26-2011 Indec. Ex. children dressed at for 14-9911 99 Disbarment of attorney for 9-911 Entering child for indec. purposes 26-2029	Nudity or sexual conduct, material depicting 26-2102 See obscene, definition 26-2101 (b)	Nuisance: "...tends greatly to corrupt the manners and ... morals of... the people" 72-2-1 Crime is criticizable as a nuisance 72-9901	26-2012 May modify assault 26-1306	26-2009	26-2010	26-5901 et seq.	26-2008	26-202 et seq. 27-304 41-10 16-6901 Lewd loose 72-101 Nuisance 72-101 Prostitution, exhibitions of body by prostitutes 26-4201
Obscene defined: "...if considered as a whole, applying community standards, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, an interest without redeeming social value and, in addition, it goes substantially beyond customary limits of candor in describing or representing such matters." 26-2101 (a)										
				HAWAII						
727-8 et seq. Public shows 141-889 Obscene defined: 727-8	709-1 727-1 et seq. Lascivious conduct 709-1	Indecency (1)		Nuisance: decree ...Hawaiians "...obscene, lewd, lascivious, filthy, indecent, or ...exposure... ...basis in the customs of the people..." 727-8	711-1 -2	704-11 et seq.	704-15 et seq.	704-61 et seq.	704-11	711-1 et seq. Lewdness 711-1
Obscene defined: "...exhibition, lewd, lascivious, filthy, indecent, or sadistic nature, or the dissemination of which consists of pictures or shows of lust or sex, or which tends to corrupt the morals of the citizens of the nation, or of certain sensibility..." 727-8										

					IDAHO					

OBSCENITY	LEWDNESS	INDECENCY (Indec. Ex.)	NUDITY	SEXUAL HYPERBOLE	OBSCENE LANGUAGE	ADULTERY	FORNICATION	SODOMY	INCEST	PERVERTION
					ARIZONA					
13-3.1 et seq. Minors 13-3	13-1 et seq. Lewd act in presence of child carrying penalty of minimum 13-1.2, .3	Exposure 13-1.1		Nuisance "...obscene..." 13-7.1	Profane and indecent 13-3.1	13-1.1	violation... cohabitation 13-1.1	13-1.1, .2	13-1.1	13-1 et seq.
Obscene defined: "...obscene, indecent, immoral, or impure...which would tend to the corruption of the morals of youth or others..." 13-3 [illegible] play, exhibition, show or entertainment) . "...obscene, lewd, indecent, lascivious, or filthy...or article of indecent or immoral use." 13-1 (book, pamphlet, picture, writing or instrument).										
					ARKANSAS					
41-4301 Minors 41-4301 e	Lewd and lascivious behavior; "sexual intercourse... being viewed ...or the unclothed genitals of a man when..." 41-3608	Exposure 41-3609	Sex crimes definition 41-4301 (2) (a)	"Indecent books" 41-4311	In films 41-112 Quarantined 4970 telephone 41-4113	41-3607	41-308 41-310 Homeland	41-3601 aggravated sodomy 41-3606	41-301	41-302 et seq.
Obscene defined: "...considered as a whole, its predominant appeal is to prurient, shameful or morbid interest in nudity, sex, excretion, sado-masochism, and the material is patently offensive and clearly without redeeming social value..." 41-4301 (2) (a)										
					KENTUCKY					
436.060 et seq. Minors 436.201 (1) et seq. and 436.040 et seq. Public, Federal areas 436.200 See alternate agencies available" Minors can in comic books 436.040 et seq.	436.070 Exhibiting matter, sale or bail 436.070	Exposure lighting your 436.080 Indecent practices 431.100 (prescribed 4970)	"Nudity" See obscenity definition 436.101 (a)	Suggestive, obscene matter 436.070	86.170 telephone 436.107 exposing police nursing 431.060 436.150 book 377.060 437.000	436.070	436.070	Sodomy buggery 436.060	436.060	436.060 436.01 Incest 436.03
Obscene defined: "...to the average person, applying contemporary standards, the predominant appeal of the matter taken as a whole is to prurient interest, a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters." 436.101 (1)										
					LOUISIANA Civil Statutes Are Same					
14.106 Minors 14:91.11 14:92.2 Pre-emption of regulation 14:91.2	Disorderly conduct 14:103 Cohab. of minors 13:351	Cruelty to Juveniles "place where sexuality indecent and impure obscene...is allowed..." prohibited" 14:92 Indecent behavior 14:81 Public morals 14:283 et seq.	Nudity defined: 14:92.2 A (3)	Obscenity, Nuisance "exaggeration, perversion or obscenity" 13:4781	14:82 telephone 14:285 45:1966 Language or gestures 14:103		(Indexed under other topics)	14:89	14:78	14:89 14:79
Obscene defined: "(2) Exposure of one's person in a public place...that one might see it or view...by another...with the intent of arousing sexual desire. (3) Production [of matter]...with the intent to primarily appeal to the prurient interest...of any kind, lascivious, filthy or sexually impure [sense]...(5)...any lewd, lascivious, sexually indecent dancing, lewd, lascivious or sexually indecent posing, lewd, lascivious or sexually indecent body movements..." 14:106 A										

	LEWDNESS	INDECENCY (Subsec. No.)	NUDITY	MORAL NUISANCE	OBSCENE LANGUAGE	ADULTERY	FORNICATION	SODOMY	INCEST	PROSTITUTION
					MAINE					
17-2001 et seq. 17-2101 17-2301	17-3851	17-301	Nudity defined: 9-609	Nuisance: "Places reputed to be houses" 17-2701	Indecent language publicly and offensive language 17-452	17-101	17-1151	17-1001	17-1501	17-3051
17-2501 et seq.	Obscene defined: "...illustrations of ...indecent, immoralities, sexual perversion, immodesty or lust, or obscenity, indecency or immodesty..." 17-2501									
					MARYLAND					
27-27 et seq.	Defined 27-35	Indecent exposure 27-122	Nudity prosecuted and defined 27-416 A-D Nudity and sexual displays 27-416A	Nuisances: obscenities; equity and equity 27-416 A	Profanity cursing in streets 27-121 Blasphemy 27-12 Telephone 27-555A	For divorce 10-24	Adultery for divorce, 27-1	27-343 534	27-535 550 560	27-1 et seq. 27-121 429 430 431 575
27-403 et seq. 27-415 et seq. 27-439 et seq. 27-440 et seq. 27-447 et seq.	"...lewdness..." 27-416 Held to give adequate warning of the conduct proscribed and to mark boundaries sufficiently definite for judges and juries fairly to administer the law. Levin v. State, 1 Md. App. 230, 228 A. 2d 587 (1967).)									
					MASSACHUSETTS					
Ann. Laws ch. 272, sections 16-28	General Statutes: "Lewd, obscene, indecent or impure shows ...or tending to corrupt the morals of youth..." 272-31 33 Abortion and inducements 272-19 Incest and incestuous persons 272-13	Indecent Exposure 272-53 Devices for indecent purposes 272-21	Nudity: See discussion of definition 272-30 (par. 3)	Obscenity, persons in equity 272-28C Nuisance "prostitution, assignation or lewdness" 139-4	Profane obscene threats Imagery 272-31 Blasphemy 272-34 Obscene language at sporting events 272-34A Arrest for using 272-53 Telephone 260-14A	272-14 et seq.	272-15 et seq.	272-34 Dissolved and incestuous unions 272-36 35A 272-45	272-17	272-53 et seq. Nuisance 139-4
	"...obscene, indecent or impure..." 272-28A									
Crimes in Minn. Stat. Ann.	Crimes defined: "...obscene, indecent or impure, harmful to minors, or manifestly tends to corrupt the morals of youth..." "...harmful to minors" means "...representation of nudity, sexual conduct or sexual excitement which appeals predominantly to the prurient, shameful or morbid interest of minors under eighteen years of age, is patently contrary to prevailing standards of adults in the community as to suitable material for such minors, and is utterly without redeeming social importance for such minors." 272-28									
					MICHIGAN					
Penal Code 31.171 et seq. 30.2000 et seq. Minn. 34.171 (1) Chemically operated 16.2000 Prostitution 34.171 (2)	Gross lewdness and incestuous behavior 30.547 Transvestism 30.570	Exposure 30.567 (1) City power 5.1760 Gross indecency 30.570 (2) Inhabitation of children 30.315	Nudist camps, regulation 7.351 (2a)	Village powers 5.1255 5.1332 Nuisances: 30.560	Indecent language in presence of women and children 30.560 "Lewdness, assignation, prostitution, cursing, gravations, disorderly persons, illegal narcotic drugs, illegal liquor..." 27A.3001 Chemically Dependent: "...obscene, lewd, incestuous, filthy, indecent, or disgusting, or...indulgence of indecent or unusual sex..." 27A.2930	30.310 339	Lewd and incestuous cohabitation 30.567	30.351 356	30.565	30.131 .345 (1) .600 .703 .717 .1305 .1805 Nuisances 27A.3001
	Crimes defined: 1. "...obscene, lewd, incestuous, filthy or indecent, salacious or scandalous..." 2. Test to be applied: "...the effect of the [material]...considered as a whole...upon the average person in the community....judged...by the standards of common conscience of the community of the contemporary period of the violation [charged]." 3. "...portrayal...of sexual sex, or sexual relations...of perversion, lust or sexual passion...." 1. 30.571 (1); 2. 30.571 (2); 3. 30.571 (3)									

OBSCENITY	LEWDNESS	INDECENCY (Indec. Ex.)	OBJECT	MORAL NUISANCE	OBSCENE LANGUAGE	ADULTERY	FORNICATION	SODOMY	INCEST	PROSTITUTION
					MISDUCT					
827.240 et seq. Minors 827.255 Village power to restrain 822.230	gross lewdness and boisterous behavior 827.11	Local ordinance 827.11 Indecent exhibition 827.11 .251	Nudity defined 827.252 (3) Nudity (minor) 827.253 (a)	Obscenity: Village power to restrain and punish 822.230 Obscenity Public Nuisance 600.74	Language provocative of assault 865.10 telephone 934.74	827.16 (repealed)	827.16 (repealed)	800.253 Mandatory 800.254	827.13	827.10 et seq. Repealed
Cha-costly is hostile to obscene appeal used to arouse commercial exploits. 827.291 Bubble-X										
Minors parties raising system, cont. 827.257										
Obscene defined: "Whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interests." 827.240										
					MISDUCT					
11-3270-01 et seq. Minimum penalties and dispositi 11-3270-08 Exposed 11-3270-10 equity rules in procedure 11-3270-06 Inverse prosecution 3270-15	Medium or lack in public view 30-2232	"private party" exposure 11-3290 Obscene indecent sexual exhibitions 11-3286		Nuisance "lewdness, exhibitionism or prostitution" 11-3260 Obscenity as/and 11-3274-10 Obscenity action in Chancery ct. 11-3274-04 rules of civil procedure pertaining to equity cases are applicable 11-3270-06	"Profanity coarse or curse...use vulgar and indecent language..." 11-3291 telephone 11-3291.1	11-3260 et seq.	11-3260 et seq.	Sex re-exercised	11-317 450	11-310 4 seq. Exposure 11-280
Obscene defined: "...to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." 3270-02										
					MISDUCT					
943.270 et seq. Search and seizure 942.180 et seq. 943.290 Minors 943.250 Exposed 943.201	943.450 943.250	Exposure to minors 943.250 Exposure 943.250		Obscenity enjoined 943.285	Vulgar obscene or indecent pleadings in newspaper 943.290	943.250		943.230	Infamy 943.220	943.30 et seq. Exposure "Body Heats" 943.230
Obscene defined: 1. "...through mainly in...novelists, whippings, bribery, assignations, intrigues between lust and vagrant and immoral conduct of persons..." 943.270; 2. "...obscene, lewd, licentious, indecent or lascivious...or other publication of indecent, immoral or scandalous character...or publish in any newspaper any vulgar, scandalous, obscene or immoral pleadings or evidence..." 943.290										
					MONTANA					
94-3601 et seq. Minors enforcement 94-3601 94-3611 94-3613	Lewdness 94-3602	Indecent exposure 94-3603 "private parts"		Nuisance: "indecent or offensive to senses" 17-101 93-2603 94-3601 et seq. 17-101 17-121	Using loud or obscene or vulgar or words 94-3603 (3)	94-4107	94-4107	94-409 94-410	46-101 94-705	94-3607 et seq. Exposure 94-3603
Minors defined: "Lewdness, exposition, prostitution, gambling, [illegal] sale [illegal] marriages), or other illegal acts prohibited in title 94 chapters 24 and 35." 94-3601										
Obscene defined: "...to the average person, applying contemporary standards, the predominant appeal of the matter, taken as a whole, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters." 94-3601										

CRIMES	LEWDNESS	INDECENCY (Lewd, Ex.)	NUDITY	MORAL NUISANCE	OBSCENE LANGUAGE	ADULTERY	FORNICATION	SODOMY	INCEST	PROSTITUTION
					NEVADA					
200.010 et seq. Homicide generally; when justifiable or excusable 200.120 et seq. Death defined 200.580 Person defined 193.130	201.190	Indecent exposure 201.220		Obscenity injunction 40.010, 40.020, 40.040 Nuisance defined 244.360 Offensive water nuisance 244.365 Nuisances "Lewdness, assignation, or prostitution" 244.360 Person defined "...obscene, lewd, indecent, or lascivious..." 201.235	In presence of female 200.510 Defined 200.515 Child use 432.240	201.190	Seduction and fornication 201.540 201.550	201.190	201.180 et seq.	201.430 et seq. Injunction 40.140
					KENDA					
201.190 et seq. Homicide when justifiable 200.120 Person 200.590	Open and gross lewdness 201.210 Depravation of sex offenders 207.151 et seq.	Indecent exposure 201.220 Exhibition of "obscene indecent or immoral" show 201.253 Employment for indecent exhib. 609.210	Nudist colonies 644.070 Nudity defined 201.261 Nudity (minors) 201.265 (1) Nudity: see obscenity definition 201.250 (2) (b)	Public nuisance 202.450 .480 City power 266.350 Obscenity injunction 201.250 (4) (b)	Obscene calls, telephone 201.255	Grounds for divorce 125.010	(see sexual intercourse)	201.190	201.180	Advertising prostitution forbidden 201.430 et seq. Pandering 201.300
Obscene defined: "...that which considered as a whole has as its dominant theme or purpose an appeal to prurient interest or a shameful or morbid interest in nudity, sex or lewdness going substantially beyond customary limits of candor or description or representation of such matters." 201.235 (2) (b)										
					NEW HAMPSHIRE					
570:1 et seq. City's power to punish 47:17	570:1 et seq. 570:15	Indecent exposure 570:4 Indecent conduct 570:33 et seq.		Nuisances: "lewdness, assignation, or prostitution" 544:1 Removal purposes chap. 544 Offensive businesses 147:35	Lascivious speech 570:25 570:2 :3 Offenses against morality 570:2 telephone 572:39-b 571:14	570:1 :2	570:4	570:9	570:7 457:1 et seq.	570:14 et seq. Nuisance 540:1 570:19
Obscene defined: "...obscene or lewd or lascivious..." 570:14										

OBSCENITY	LEWDNESS	INDECENCY (Indec. Ex.)	NUDITY	MORAL NUISANCE	OBSCENE LANGUAGE	ADULTERY	FORNICATION	SODOMY	INCEST	PROSTITUTION
					NEW JERSEY					
2A:115-1 et seq. Pandering 2A:115-1,2 To minors 2A:115-1,3 115-3.3	Cases involving sex or sexitious acts... Acts tending to debauch morals 2A:169-1	Exposure 2A:115-1 Indecencies in publication 2A:115-3		Nuisance: "gather...for purpose of gratifying themselves" 2A:130-2 110 N.J.L. 381 Municipal power 40:72-3 Obscenity injunction 2A:115-3.5 Nuisance: "prostitution, lewdness, or assignation"	2A:140-2 Indecent communications to female 2A:115-4	2A:56-7 2A:89-1	2A:110-1	2A:143-1 -2	2A:114-1 et seq.	2A:115-1 et seq.
Obscene comic books "...basic factor in impairing the ethical and moral development of our youth and constitute a clear and present danger to the people of the State." 2A:115-3.3 Prompt judgment 2A:115-3.6								Abominable and detestable crime against nature 2A:139-2		

Obscenity:
1. Legislative findings: "The Legislature finds that the standards of obscenity now enunciated in chapter 115 of Title 2A of the New Jersey Statutes as amended and supplemental in recent years is unnecessarily permissive and a hindrance to effective legal action against obscene matter. The Legislature further finds that such unnecessary permissiveness has resulted from the incorporation into New Jersey Statutes of language from influential opinions authored by certain United States Supreme Court justices; which language, however, does not represent binding majority decisions of the Supreme Court and, accordingly, need not bind the Legislature or the judiciary of this State." 2A:115-1.b

2. Obscene defined: "...that which to the average person, applying contemporary community standards, when considered as a whole, has as its dominant theme or purpose an appeal to prurient interest." 2A:115-1.1

					NEW MEXICO					
Power of municipalities to suppress 14-23-12 14-17-14		Exposure 40A-9-4		Nuisance: "injurious to public... morals..." 40A-8-1		40A-10-3		40A-9-4	40A-10-3	40A-9-1 et seq.
					NEW YORK					
Penal Code 235.00 et seq. Injunctive proceedings PC 235.10 PC 235.12 to remove PC 235.20 PC 235. 22 Action: Posture (Exhr. 232-a Seizure and forfeiture Penal 470.20		Indecent exhibitions Exhr 232-a As fairs or expositions Agric. and M 188 revocation of license for, vehicle and T 396 Indecency injunction Crim 23-a	Nudity defined PC 235.20 (3)	Obscenity injunction CPLR 6330 Obscenity town's power to prohibit Town 130 (11) Nuisance: "lewdness, assignation, or prostitution" Pub H 2320	Obscene gestures or lang. Penal Code 240.20 Abusive or obscene language in public Penal 240.25	Penal Code 255.17		Penal Code 130.00	Penal Code 255.25	Penal Code 230.00 et seq. words, &c. as nuisance Pub H 2320 et seq. loss of beverage license Alc Bev. Ch. Appendix 54.10

Obscenity
1. Constitution. (Liberty of conscience not to excuse acts of licentiousness.) Const art 1, Sec.3
2. Obscene defined: "...(a) considered as a whole, its predominant appeal is to prurient, shameful or morbid interest in nudity, sex, excretion, sadism or masochism, and (b) it goes substantially beyond customary limits of candor in describing or representing such matters, and (c) it is utterly without redeeming social value." Penal Code 235.00

					NORTH CAROLINA					
14-190.1 et seq. to minors 14-190.7 190.8 Adversary proceedings 14-190.2 & injunction	Lewd women within three miles of college 14-188	Indecent exposure 14-190.9 Indecent exposure, sexual shows 14-190	(see Intent)	Nuisance: "lewdness, assignation, prostitution, gambling, or illegal sale of whiskey or narcotic drugs" 19-1 et seq.	Profane or indecent language 14 -196 telephone 14-196 profane or obscene language on highways 14-197	14-184	14-184	14-177	14-178 179	14-180 et seq. Seduction 14-27 Nuisance 19-1
					Obscenity injunction 14-190.1					

Obscene defined: "...(1) The dominant theme of the material taken as a whole appeals to the prurient interest in sex; and, (2) the material is patently offensive because it affronts contemporary national community standards relating to the description or representation of sexual matters; and, (3) the material is utterly without redeeming social value; and, (4) the material so used is not protected or privileged under the Constitution of the United States or the Constitution of North Carolina." 14-190.1 (b)

Statute	Lewdness	Indecency (Subsc. Dr.)	Nudity	Moral Interest	Obscene Language	Adultery	Fornication	Sodomy	Incest	Prostitution
					NORTH DAKOTA					
12-21-0 et seq.	Lewdness unlawful 12-21-1(2)	Indecent exposure 12-21-10		Voluntary "...attempts Lewdness..." 12-21-03 et seq.	Obscene language 12-21-03 et seq.	12-21-02 et seq.	12-21-09	12-21-07	12-21-06	12-21-04 et seq.
	"Lewdness shall include any indecent or obscene act" 12-21-1(2)	Carnivals, indecent shows 12-21-09			Blasphemy 12-21-01		Unlawful cohabitation 12-21-12			Promoting prostitution 12-21-07
	Lewdness indecent 12-21-10	Producing indecent material 12-21-10								
		Shows for indecent purposes 12-21-21								
		"Act which openly outrages public decency and is injurious to public morals" misdemeanor 12-21-02								
Other Statutes	"...obscene, lewd, salacious or lascivious...or other matter of indecent character..." 12-21-07									
					OHIO					
2907.31 et seq.	Definitions Lewd picture in Ohio 2907.41	Indecent exposure 2907.09 Giving immoral exhibition 2907.40	Nudity defined 2907.34 Nudism prohibited 2907.31	Voluntary "Lewdness, assignation, or prostitution...lewd, indecent, lascivious or obscene films..." 2767.01 et seq. Obscenity defined 2907.37	713.01 2913.01 Minors, pers. to furnish 713.15 profane, immoral, or indecent language 2907.40 Obscene or lascivious language before female or child 2907.30.1 Telephone 4931.31	2907.01 Owner barred for, 2307.01	2907.09 Settlement RC 3941.07	2907.01 2907.04 Giving immoral exhibitions ed. 2907.40	2907.07	2907.21 et seq.

Other Statutes cited: 1. "...obscene, lewd, or lascivious...(immoral)...or article of an indecent or immoral nature...or show to a minor...tendency of moral decay, lust, or crime..." 2907.34

1. "...considered as a whole and judged with reference to ordinary adults, any of the following apply: (1) Its dominant appeal is to prurient interest (2) Its dominant tendency is to arouse lust by displaying or depicting nudity, sexual excitement, or sexual conduct in a way which tends to represent human beings as mere objects of sexual appetite; (3) Its dominant tendency is to arouse lust by displaying or depicting bestiality or extreme or bizarre violence, cruelty, or brutality; (4) It contains a series of displays or descriptions of nudity, sexual excitement, sexual conduct, bestiality, extreme or bizarre violence, cruelty, or brutality, or human bodily functions of elimination, the cumulative effect of which is a dominant tendency to appeal to prurient interest, when the appeal to such interest is primarily for its own sake or for commercial exploitation, rather than for a genuine scientific, educational, sociological, moral, or artistic purpose." 2907.34 A

OBSCENITY	LEWDNESS	INDECENCY (Indec.Ex.)	NUDITY	MORAL NUISANCE	OBSCENE LANGUAGE	ADULTERY	FORNICATION	SODOMY	INCEST	PUBLIC TES
					OKLAHOMA					
21-1021 et seq. 21-1040.2 et seq. Seizure 21-1023 Jury trial 21-1034 Oklahoma Literary Commission 21-1040.2 display of sexual impressions on outdoor screen prohibited 21-1040.12	Lewd defined: "licentious, unchaste, debauched, impure, salacious or pornographic" 21-1040.12	Indecent exhibition or exposure to "private parts" "such as is offensive to decency...or to excite ...lewd thoughts." 21-1021 (second)		Nuisance: "...offends decency..." 21-1 Injunction 21-1397 Obscenity injunction 21-1022	21-911 et seq. Recording obscene or indecent language, songs, etc. 21-1021 (4) Telephone 21-1171	21-871 et seq. Imposition of salutary forbidden 21-1040.21 Incestuous adultery 21-885	Showing sexual intercourse on outdoor screen (Widow.) 21-1040.12	21-886 -887 Showing unnatural copulation on outdoor screen 21-1040.12	21-885 43-3 21-217	21-88 21-88
Obscene defined: 12. ..obscene filthy, indecent, immoderate, lewd or unfit..." 21-1040.8; 2. "...to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." 21-1040.12 [also variously defined: filthy, indecent, lascivious, and lewd 21-1040.12]; 3. "(b) ' obscene literature'...any literature offensive to the chastity to modesty, expressing or presenting to the mind or view something that purity and decency forbids to be exposed, or...comic books which are not uplifting and beneficial to the education, welfare, and character building of the children of Oklahoma." 21-1040.1 (b)										
					OREGON					
Obscene motor prints 167.151	Lewdness defined 465.150	Indecent exposure 167.345		Nuisance: "lewdness, lasciviousness, or prostitution, or any other immorality..." 465.120	166.060 school pupils 339.250	167.065 .080	167.030 .033 .050	167.040	167.025 .055	167.35 167.35 167.35 167.35 167.35 167.35
Obscene defined: "...if, considered as a whole, its predominant theme appeals to prurient interest, and if it is plainly offensive and goes substantially beyond the customary limits of candor in describing or representing such matter with reference to ordinary persons." 167.151 (2)										
					PENNSYLVANIA					
18-4534 Complaint 18-783 Obscene comic books 18-3931 Injunction 18-3933.1 Censorship films 6-43	Nuisance 18-417 et seq.	Public indecency not 18-4519	Nudity defined 18-4534	Nuisance: "lewdness, foulness, and/or prostitution..." 18-417 Public Nuis. "detrimental to public health." 53-37299 Obscenity injunction 18-3932.1	18-432	18-4585	18-4536 Adpn. used for, nuisance 18-417 et seq.	18-4585	18-4537 minor 18-530	18-88 18-88 18-88 18-3931 18-3931
Obscene defined: "...that which, in the average person applying contemporary community standards, has as its dominant theme, taken as a whole, an appeal to prurient interest." 18-4534										

GENERALLY	LEWDNESS	INDECENCY (Indec. Ex.)	NUDITY	MORAL NUISANCE	OBSCENE LANGUAGE	ADULTERY	FORNICATION	SODOMY	INCEST	PROSTITUTION
RHODE ISLAND										
11-31-1 et seq.	Lewdness exposure 11-1-1	Promotion of obscene shows 11-31-14	Nude figures (minors) 11-31-14 11-31-10	Nuisances: "lewdness, assignation, or prostitution" 11-30-1 10-1-1 et seq.	11-9-12 13 11-11-1	11-6-2	11-34-1 Incestuous fornication 11-6-4	11-10-1	11-6-1 11-1-1 et seq.	11-42-1 11-34-1 et seq. Pandering 11-34-1 Nuisance 11-30-1
"Lewd" see obscenity definition 11-31-10				Obscenity injunction 11-31-12						
Obscene defined: 1. "...obscene..." 11-31-1; 2. to minors: "...devoted to, or is principally made up of descriptions of illicit sex or sexual immorality or which is obscene, lewd, lascivious, or indecent, or which consists of pictures of nude or partially dressed figures posed or presented in a manner to provoke or arouse lust or passion or to exploit sex, lust or perversion...or instrument of indecent or immoral use..." 11-31-10									
SOUTH CAROLINA										
16-401 et seq. Nuisance 16-1001 et seq.		Indecent exposure 16-433		Nuisances: "lewdness, assignation, or prostitution" 10-1001 Nuisance "dangerous to human health" Vol. 17,p228 Obscenity injunction 16-416	Obscene message to women 16-553 Telephone 16-552.1	15-494 et seq. grounds for divorce 20-101	16-492 16-490 Disqualifies voter 23-63 92	16-412	16-402	16-600 et seq. Nuisance 10-1001
Public 16-401 Deceptive practices 16-403 Obscene defined: "...obscene, indecent or improper print (etc.)...manifestly tending to the corruption of the morals of youth..." 16-414		Exhibiting indecent pictures 16-415								
SOUTH DAKOTA										
13-24-1 et seq.		Indecent exposure felony 22-24-1 et seq. 22-24-2.1		Municipal power to remove 9-29-13 Zoning 11-4-7	Obscene language 22-33-7 Obscene or lascivious language in presence of women or children (also telephone) 22-24-6	22-22-17 18 Grounds for divorce 25-4-2		13-1716	22-22-19 22-22-20 25-1-6 13-1715	13-1717 et seq. Nuisance 21-10-10
Public power to regulate not limited 13-24-21		Outraging public decency and "injurious to public morals"; 22-24-6 Procuring indecent exposure 22-24-1								
					Singing, speaking obscene song, word, etc. 22-24-18					
Obscene defined: "(1)...that which, by contemporary standards as hereinafter set forth, considered as a whole, has as its dominant theme or purpose an appeal to prurient interest. (2) Prurient interest is defined as a shameful or morbid interest in nudity, sex or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters and which as a matter of state public policy is utterly without redeeming social importance." 22-24-2										

OBSCENITY	LEWDNESS	INDECENCY (Indec., Ex.)	NUDITY	MORAL NUISANCE	OBSCENE LANGUAGE	ADULTERY	FORNICATION	SODOMY	INCEST	PROSTITUTION
					ARKANSAS					
39-3002 et seq. to minors 39-3011 et seq. Injunction 39-3005		Municipal power to prohibit indecent exhibitions 6-302	Nudist colony forbidden 39-3009 Nudity defined 39-3011	Nuisance "violation in favor of decency" 39-3001 2002 16 Tenn. App. 414)	41-107 Obscene language 39-3001 Telephone 39-3002	41-3001	41-3002	39-707	39-701 706	39-3301 et seq.
Obscene defined: "...obscene language or obscene prints... manifestly tending to corrupt the morals..." 39-3001										
					TEXAS					
Title 10 Penal Code PC 527 et seq. Adversary Hearing PC 527 (B)(1) Municipal regulation allowed PC 527 (C) Obscenity injunction PC 527 (C) Comic books PC 529	Lewd women in theater PC 528 Lewdness defined PC 667.-	Indecent exhibition PC 528 Indecent exposure: PC 535 G Exposure to infant PC 474 535c Indecent exhibitions, films PC 648 Exposure public grounds PC 852	Nudity: see definition of "prurient interest" PC 527 (B)(3)	Common nuisances "drinking, gambling, prostitution" 4664 Obscenity injunction PC 527 (C)	Obscene language PC 474 3154 d-2 Telephone PC 476	PC 499 500 501	PC 502 504	PC 534	PC 491 et seq.	Penal Code 330 et seq. 329 328 327 1070 et seq. 1121 c Nuisance 4664
Obscene defined: "(1)...material (a) the dominant theme of which, taken as a whole, appeals to a prurient interest; (b) which is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters and (c) which is utterly without redeeming social val ue." "(2) 'Prurient interest' means a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters." title 10, Penal Code, § 527 (1), (2) and (3)										
					UTAH					
76-10-1 et seq. seizure 76-10-7 Injunction 76-10-10 Obscenity to minors 76-10-1 (6) Sex-nude pornography to minors 76-10-1 (8) Commercial knowledge 76-10-1 Local regulation authorized 76-10-16	Open and gross lewdness; assaulting to lewd or lascivious or obscene manner 76-10-813	Indecent exposure (Indecen.) 76-10-1 76-10-13	Nudity: see definition of obscenity: 76-10-11	Nuisance: "...indecent or offensive to sense..." 76-10-1 Public nuisance: "...(3) Offends public decency..." 76-43-1 City power to declare and abate nuisance 10-8-60 Obscenity injunction 76-10-10 Nuisance: "lewdness, lasciviousness or prostitution" 47-3-1	Songs, ballads, or other lewd or obscene words in public place 76-10-1(5) 76-10-13	76-53-3	76-53-5 (modern.)	76-53-22	76-53-4	76-53-31 et seq. 76-53-32 76-53-3 77-36-30 78-8-1 City power to suppress 10-8-60 Nuisance 47-3-1
Obscene defined: "...whether to the average person, applying contemporary community standards, the dominant theme of the material or the conduct taken as a whole appeals to the prurient interest....Prurient interest shall mean a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters and is matter which is utterly without redeeming social importance." 76-10-11										

OBSCENITY	LEWDNESS	INDECENCY (Indec. Ex.)	NUDITY	MORAL NUISANCE	OBSCENE LANGUAGE	ADULTERY	FORNICATION	SODOMY	INCEST	PROSTITUTION
					VERMONT					
13-2601 et seq.	Open and gross lewdness 13-2601	Exhibiting obscene, lewd or indecent picture...or presents indecent or immoral show 13-2602		Power of Municipalities 24-2121		13-201 202 203		Felonies 13-2603 2601		13-2631 13-2632 Houses of ill fame 13-2604
Obscene public pictures 13-2603										
Obscene defined: "...lewd or indecent...or which tends to the corruption of the morals of youth..." 13-2601										
					VIRGINIA					
18.1-227 et seq. May be ordered 18.1-236.1		Indecent exposure 18.1-214 18.1-235 to Child 18.1-214	Nudity: was obscenity definition 18.1-227 Sexual Displays 27-415 A-G	Obscenity injunction 18.1-238.3 Municipal Power 15.6	Operating 18.1-237 et seq. Telephone 18.1-238	18.1-187	18.1-188 Cohabitation, 18.1-193	?	18.1-191	18.1-194 et seq.
Obscene defined: "...that which considered as a whole has as its dominant theme or purpose an appeal to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters." 18.1-227										
					WASHINGTON					
9.68.010 et seq. "Erotic material" defined 9.68.050 (2) Power "whether only" bifid 9.68.060 (3 b) Civic books 7.42.010 et seq.	Lewdness 9.79.120 Sale of lewd publication 49.37.130 Nuisance: 7.48.010 Injunction 7.42.010	Indecent exposure 9.79.080 9.79.120 Indecent articles 9.68.030		Nuisance: "offend public decency" 9.66.010 Nuisances: "lewdness, assignation, or prostitution" 7.48.010 Obscenity injunction 7.42.010 et seq.	Indecent or vulgar language 9.68.040 In public conveyances 9.27.030 telephone 9.61.230	9.79.210 120	False charge of 4.24.150	9.79.100	9.79.090	9.79.10 Nuisance 7.48.010
Obscene defined: 1. "Erotic Material": "...material... the dominant theme of which taken as a whole appeals to the prurient interest of sumt in sex; which is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters or sado-masochistic abuse; and is utterly without redeeming social value;..." 9.68.050 (2); 2. "Prohibited publications": "...detailed account of ...rape, carnal knowledge, seduction, adultery, sodomy or other sexual crime...or (3) Any detailed statement of any evidence of indecent, obscene or immoral acts offered in any trial...or, any...account of the actions of any public prostitute (except concerning public welfare)..." 9.68.020									
					WEST VIRGINIA					
61-8-1 leading to corrupt youth 61-8-11 Pornographical publications 61-8-10 61-8-3	Lewd and lascivious cohabitation 61-8-4 Open and gross lewdness Nuisance: Lewdness 61-8-1	Indecent exposure 61-8-20 Immoral shows prohibited -fairs- 19-7-8		Equitable remedies in aid of charity, morality and decency: Article 8 61-8-1 et seq. Nuisance: "lewdness, assignation, or prostitution" 61-8-1	Profanity, obscene, indecent or vulgar language (& telephone) 61-8-16 Profane swearing 8-12-15	61-8-3	61-8-3- Lewd and lascivious cohabitation 61-8-4-	Crimes against nature 61-8-13	61-8-12	61-8-5 et seq. Nuisance 61-8-1
Obscene defined: "...obscene language...or description manifestly tending to corrupt the morals of youth...or public morals..." 61-8-11										

OBSCENITY	LEWDNESS	INDECENCY (Indec. Ex.)	NUDITY	MORAL NUISANCE	OBSCENE LANGUAGE	ADULTERY	FORNICATION	SODOMY	INCEST	PROSTITUTION
					VERMONT					
13-2801 et seq. As minors 13-2804 et seq. Obscene motion pictures 13-2803	Open and gross lewdness 13-2601	Exhibiting obscene, lewd or indecent posture...or presents indecent or immoral show 13-2802		Power of Municipalities 24-2121		13-201 202 203		Fellation 13-2601 2601		13-201 13-202 Keeping a 13 Ver. 13-204
Obscene defined: "...lewd or indecent...or which tends to the corruption of the morals of youth..." 13-2801										
					VIRGINIA					
18.1-227 et seq. May be enjoined 18.1-236.3		Indecent exposure 18.1-214 18.1-238 In Child 18.1-214	Nudity: see obscenity definition 18.1-227 Sexual Displays 27-416 A-C	Obscenity injunction 18.1-236.3 Municipal Power 15.0	Swearing 18.1-237 et seq. Telephone 18.1-238	18.1-187	18.1-188 Cohabitation, 18.1-193	?	18.1-191	18.1-21 et seq.
Obscene defined: "...that which considered as a whole has as its dominant theme or purpose an appeal to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters." 18.1-227										
					WASHINGTON					
9.68.010 et seq. "Erotic material" defined 9.68.050 Placing "adults only" label 9.68.060 (3) (a) Comic books 7.42.010 et seq.	Lewdness 9.79.120 Sale of lewd publication 9.68.130 7.48.010 Nuisance: 7.48.010 Injunction 7.42.010	Indecent exposure 9.79.080 9.79.120 Indecent articles 9.68.030		Nuisance: "offend public decency" 9.68.010 Nuisance: "lewdness, assignation, or prostitution" 7.48.010 Obscenity injunction 7.42.010 et seq.	Indecent or vulgar language 9.68.040 In public conveyances 9.27.030 Telephone 9.61.230	9.79.130 130	False charge of 4.24.120	9.79.100	9.79.080	9.79.13 Prisoner 7.48.80
Obscene defined: 1. "Erotic Material": "...material... the dominant theme of which taken as a whole appeals to the prurient interest of minors in sex; which is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters or sado-masochistic abuse; and is utterly without redeeming social value...." 9.68.050 (1); 2. "Prohibited publication": "...detailed account of ...rape, carnal knowledge, seduction, adultery, sodomy or other sexual crime...or (3) Any detailed statement of any evidence of indecent, obscene or immoral acts offered in any trial...or, any...account of the actions of any public prostitute...[concerning public welfare]..." 9.68.020										
					WEST VIRGINIA					
61-8-11 Dealing to corrupt youth 61-8-12 Pornographic publications 61-8-10 61-8-3 Obscene defined: "...obscene language...or descriptions manifestly tending to corrupt the morals of youth...or public morals..." 61-8-11	Lewd and lascivious exhibitation 61-8-4 Open and gross lewdness Nuisance 61-8-1 Lewdness 61-8-1	Indecent exposure 61-8-20 Immoral shows prohibited -Injunction 19-7-8		Equitable remedies in aid of chastity, morality and decency: Article 8 61-8-1 et seq. Nuisance: "lewdness, assignation, or prostitution" 61-8-1	Profanity, obscene, indecent or vulgar language (& telephone) 61-8-16 Profane swearing 6-10-15	61-8-3	61-8-3- Lewd and lascivious cohabitation 61-8-4-	Crimes against nature 61-8-13	61-8-12	61-8-1 et seq. Nuisance 61-8-1

APPENDIX Q

Page

Los Angeles Herald Examiner News Article of Feb. 18, 1974, reporting on T.V. logging of "The Sex Symbol" for March 5, 1974 being dropped..... 3

Los Angeles Times News Article of Feb. 19, 1974 reporting Connie Steven's (Star of "The Sex Symbol" and alleged T.V. nude scene) as saying "This will turn my career around as 'Carnal Knowledge' did Ann-Margret's"..... 4

TELEVISION

TV MAVEN

MORTON MOSS

The Great 'Sex' Crisis

It was hardly a riddle wrapped in an enigma that Connie Stevens, in "The Sex Symbol, which ABC had lagged for Tuesday, March 5, had the bizarre papier-mache odyssey of the late Marilyn Monroe as the source of an ambitious bowie of the Week performance.

So when ABC abruptly dropped it from the schedule, without a too definitive statement about when it would finally be screened, there was a mailer uproar as newspapers around the country. There followed a mad jingling of telephone calls from editors whose TV books for the Sunday preceding March 5 were already irretrievably printed.

Today, although ABC holds the film inconsonicado, "to do additional work on it," according to Barry Diller, network vice president for primetime programs, it has already become a success de scandale. Lavish hints of nudity, an aura of neurotic eroticism and the celebrated on whom the characters are allegedly modeled lend bite and edge to the keenest of speculation. Besides, the principals in these rooms at the top have seasoned the dish with greatly contradictory utterance as to cause.

CONNIE STEVENS

ABC and Screen Gems, the co-producer with Doug Cramer, had been engaged in a high decibel promotional campaign. Unofficially, this was to be the Marilyn Monroe story, although, officially, indentation teamed with coy reluctance to spill it out. They were reaping a boomerang blast from their swinging publicity campaign. Unless . . . unless the boomerang wasn't really a boomerang but also a calculated result of that campaign, a thought nearly too cynical to contemplate.

Connie Stevens told us from Harrah's, at Lake Tahoe: "I'm devastated. It's the best thing I've ever done. ABC okayed the television nudity and then got worried and wanted to take it out. If ABC is willing, I'd like to buy the picture and release it myself."

They're In Opposite Camps

Diller and Cramer contend that Stevens is mistaken about the nudity, perhaps confusing the TV version with the frankly undressed film for foreign distribution. But, elsewhere, they fall into diametrically opposed camps on the steps leading to the shock postponement.

"It's absolutely and categorically untrue," Diller said, "that we approved nudity in the television film. We never approved it and wouldn't care to be in a position of approving it. It's ridiculous to claim otherwise. We did shoot some nudity for the print meant for foreign theatrical distribution. I don't mind being attacked over something we did. What upset me is to be attacked for something we didn't do.

"I guess all the fuss comes because of the publicity. It's not that complicated. It was postponed simply because we want to do additional work on it. We should be ready with it in the

(Continued on Page 5)

Morton Moss: Ingenue

(Continued from Page 4)

future. I think sometime this season. We'll know more exactly in the next couple of weeks. We just cut the time too short in making the picture. There was no other reason, no pressure. No outside force had anything to do with the decision."

Cramer said, "I only learned last Wednesday about the decision to postpone. I don't know what ABC wants done with it. I haven't had that meeting yet. ABC programming and continuity had seen it and approved it in rough-cut. ABC is obviously contradicting itself. Somebody changed his mind. I can't tell you why because I don't know why. As for the nudity, there wasn't going to be any for television. It was Connie's exclusion, I think, with the longer version for the foreign market."

He disclosed that "The Sex Symbol" cost a half million dollars, plus. He expected that it would eventually be released because of Columbia's heavy investment in it. Of course, it could be released as a feature in Europe and kept in solitary here by ABC.

The script of "The Sex Symbol" was written by Alvah Bessie, transposing the content of his novel, "The Symbol," to the electronic medium. It's the story of an orphan. She has foster parents, becomes a Hollywood sex symbol, is unwesonly involved with a football player, a famous painter and a United States senator.

"You could insist it wasn't based on Marilyn Monroe," said Cramer, "But you'd be wrong. The feeling of ABC in that it wasn't ready. I think we had a film that would have been ready for release March 5, the original television date."

She Thought It a Breakthrough

Connie's chagrin was tied to her belief that this could be the breakthrough movie for her. She has always brooded that she could never obtain roles that were sufficiently weighty. She's convinced "The Sex Symbol" characterization turns a corner for her.

"I've existed on a lot of light-weight things," Stevens said. "I was the cute little bunny girl next door. That was the image. I've never really done the things I've wanted to do. I was at Warner's seven and a half years. I fought the parts they kept throwing at me. I saw it coming. I was no longer an ingenue. I had the mind and body of a woman. I had to have a change, or I'd go into oblivion.

"I never met Marilyn Monroe, but she fascinated me. She was the No. 1 movie queen. In a way, it was the ultimate female life. She had so much animal sex. Actually, she was a sex symbol who wasn't really a sex symbol. She was a child, an emotional cripple. She couldn't survive the complexities an actress, especially one in her position, has to face."

We had spoken to Stevens before, of course. But we can't remember her ever discussing a project with such vocal intensity. The conceptions of Monroe and nudity fuse without any difficulty. The problem, if that's how you choose to label it, naturally arose with the shooting of "The Sex Symbol."

Connie said, "I hadn't ever previously been completely nude in front of a camera. I discovered what it's like for an actress to take off her clothes and do a highly emotional scene. It has a great effect on your psyche, on your subconscious. It wasn't 100 times but 1000 times better in the nude. It brought my entire inner person to bear on the situation. It was so poignant, I became unglued. Once, after the director said, 'Cut!' I cried for five minutes."

At the moment, she's unglued again. But there are ungluings and ungluings.

JOYCE HABER

Los Angeles Times Tues., Feb. 19, 1974-Part

'Sex': Now You See It, Now You Don't

"The Sex Symbol" stars Connie Stevens, looking remarkably like the late Marilyn Monroe, and Dan Murray, looking remarkably like one of the Kennedys. "Symbol" is based on Alvah Bessie's controversial novel, "The Symbol," whose major characters remarkably resemble Monroe, Joe DiMaggio and Arthur Miller.

"The Sex Symbol" is the talk of Hollywood. It was screened for numerous critics and columnists last week to an overall excellent response: "Connie is absolutely brilliant, fantastic, fabulous," wrote Sue Cameron of the Hollywood Reporter.

TV Guide decided to do a close-up on this ABC Movie of the Week. The Herald-Examiner and some 30 other papers scheduled it as the cover story for TV supplements and I rushed out to interview Miss Stevens for a profile before she left for Harrah's, Tahoe with her club act—because Miss Stevens is remarkable in the film.

The film is also remarkable, in the sense that it treats the vulnerability of an American woman and her destruction by the American male. Which is a nice switch from mention and the female put-down.

It contains fine performances, too, by Jim Olsen (as a Arthur Miller), William Smith (as a DiMaggio), Madlyn Rhue (as a Pat Newcomb), (producer) William Castle (as a Harry Cohn), Nehemiah Persoff (as a Darryl Zanuck) and Jack Carter (as an MCA-type agent). It was scored by Francis Lai ("A Man and a Woman," "Love Story") after Henry Mancini turned it down "because I never score movies for television." Mr. Mancini's objectivity is apparent in the fact that he is now recording Lai's theme: Mancini's RCA single will be the first version, out next week.

Mancini's may be the first hit single in history of a score for a film that may never be shown. Because, less than three weeks before its airdate, March 5, "The Sex Symbol" was yanked from ABC's schedule. Causing a furor similar to that which occurred when "Last Tango in Paris" was yanked from the big screen in many U.S. cities.

Thus, a week from Sunday, millions of Americans will be reading local cover stories on "Symbol"—and will be treated, two nights later, not to the New Connie Stevens, but to some old NOW rerun. (In fact, the old Elizabeth Montgomery, in "The Victim.")

What happened? No one knows. But speculation began immediately. The industry and the London press were speculating that the Kennedy family, or Sen. Edward Kennedy's probable presidential campaign manager, had put pressure on ABC. Or was it Joe DiMaggio? Or Arthur Miller? Or was there too much "reality" in the film?

What is known is that the picture had been cleared by ABC's censors for airing, had been approved for theatrical distribution abroad, and that ABC's programming chief, Barry Diller, then happened to see it accidentally. I say "accidentally" because Hollywood producer-tasters will tell you that Mr. Diller almost never looks at his pictures before they go on the air.

When the news of the cancellation leaked executive

LOOKALIKES—Marilyn Monroe, left, and Connie Stevens, who portrays a character based on Monroe in suddenly canceled ABC movie, "The Sex Symbol."

producer Doug Cramer's office alone received 111 phone calls within eight hours. ABC's Diller admitted to me: "I don't understand it. I've often changed airdates, but I've never gotten so many calls from important journalists across the country."

To make matters murkier, ABC ad Screw Goss issued an "official" statement saying that "Symbol" had been withdrawn because it wasn't ready: It had been shot as a two-hour movie, was to show for 74 minutes and needed further editing. But the 74-minute version was the one approved by continuity acceptance and critics alike. Screen Gems president John Mitchell was unavailable for comment. He was in the hospital passing a kidney stone—which may become famous as "The Monroe Stone." Over the weekend, ABC's Diller came down with an upper respiratory infection. That may be known as "The Marilyn Throat."

Said performer Stevens from Tahoe (she opens at Las Vegas' Flamingo on Thursday): "The night before they canceled, all signs were 'Go.' The network had been ranting and raving about how great the movie was. They were saying I had a shot at an Emmy nomination." Insiders agree that if "Symbol" had played on its scheduled date (a show must air before March 13 to qualify), Connie would most likely have been up for an Emmy. Against Cicely Tyson, of the superb project that ABC's Diller started developing, then dropped: CBS' "Autobiography of Miss Jane Pittman." Diller said of it: "It's drudgery, pure drudgery. It's just like mopping floors for two hours—except that I've never mopped a floor." Also against Katharine Hepburn, of ABC's "Glass Menagerie," and possibly ABC's Marlo Thomas, whose special, "Free to Be You and Me," airs March 11. (Diverse as the candidates may seem, they aren't to the TV Academy, which this year changed its categories.)

Connie worked for one half her usual salary, $7,500, to get the role in "Symbol." She's promoted it on the Carson, Griffin and Mike Douglas shows. A billboard on the Sunset Strip features Connie, nude body draped in a sheet, as "Sex Symbol."

"Can you imagine?" she asks. "Can you just imagine? People are turning my head around saying, 'Did you turn my corpse around as 'Corpse Knowledge of Art Museum'? And I'm devastated."

Oddly enough, ABC has a big-night blockbuster of Marilyn-Monroe-forthcoming on its Wide World of Entertainment. And NBC has a Hallmark special production of Miller's "After the Fall" for April. Consensus is that ABC would have gotten a 50 share of audience by airing "Sex Symbol," something its badly sagging Movies of the Week this year could use. Somebody up there is apparently afraid of a 50 shares. Which will now undoubtedly go to NBC's "After the Fall."

Even 12 years after her death, the late Marilyn Monroe still makes more news than anyone in Hollywood (except Barry Diller).

APPENDIX R

Pages 89-93 of the Brief Amicus Curiae Charles H. Keating Jr. in *Paris Adult Theatre I v. Slaton*, No. 71-1051 containing Point IA1 of the Argument, titled

IA1

Page

The Common Standards of Right and Wrong Embodied in the Statutory Law of this Nation and the State of Georgia should be applied as the Rule of Law in this case in finding the Two Films to be "Obscene as a Matter of Law" 3-7

ex rel. Keating v. Vixen, 272 N.E.2d 137 at 140, 27 Ohio St. 2d 278 (July 21, 1971).

1. THE COMMON STANDARDS OF RIGHT AND WRONG EMBODIED IN THE STATUTORY LAW OF THIS NATION AND THE STATE OF GEORGIA SHOULD BE APPLIED AS THE RULE OF LAW IN THIS CASE IN FINDING THE TWO FILMS TO BE OBSCENE AS A MATTER OF LAW.

It is the basic contention of Amicus that the eyes of this Court, in reviewing the Georgia Supreme Court ruling below, should be focused upon the concepts which support the statutes being applied by Respondents, that is the universal verity that lewdness and obscenity are public nuisances, which are abatable under the law, and the ethical values shared by this Nation, as a whole, as defined in the legislative halls and documented in state and federal statutes and city ordinances. A state-by-state survey of the Nation's laws dealing with lewdness, indecent exposure, obscenity, prostitution, sodomy, adultery, fornication, incest and profanity is attached as Appendix "B". Appellants submit that these laws define the national standards which everyone in the courtroom today is seeking to ascertain.[21] This Court has on many occasions stressed community ethical values as the basis for constitutional adjudication. *Adamson v. Calif.*, 332 U.S. 46, 91 L.Ed. 1903, 67 S.Ct. 1672 (Justice Frankfurter concurring opinion). *Louisiana ex rel Francis v. Resweber*, 329 U.S. 459, 470, 91 L.Ed.422, 67 S.Ct. 374 (concurring opinion). In *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 1 L.Ed.2d 1469, 77 S.Ct. 1325, handed down on the same date as the *Roth-Alberts* decision, 354 U.S. 476, 1 L.Ed.2d 1498, 77 S.Ct. 1304 (June 24, 1957), Justice

[21] See footnote 12 at page 75.

Frankfurter, in speaking for the majority of that Court in a case closely paralleling the matter herein, said, at page 1473:

> "In an unbroken series of cases extending over a long stretch of this Court's history, *it has been accepted as postulate* that 'the primary requirements of decency may be enforced against obscene publications.' Id. 283 U.S. at 716." (Our emphasis.)

In *Solesbee v. Balkcom* (1950), 339 U.S. 9, 16, 27, 94 L.Ed. 604, 70 S.Ct. 457, Reh. Den. 339 U.S. 926, 94 L.Ed. 1348, 70 S.Ct. 618, Justice Frankfurter wrote that due process

> "embodies a system of rights based on moral principles so deeply imbedded in the traditions and feelings of our people as to be deemed fundamental to a civilized society as conceived by our whole history. Due process is that which comports with the deepest notions of what is fair and right and just. The more fundamental the beliefs are, the less likely they are to be explicitly stated. But respect for them is of the very essence of the Due Process Clause. In enforcing them this Court does not translate personal views into constitutional limitations. In applying such a large untechnical concept as 'due process,' the Court enforces those permanent and pervasive feelings of our society as to which there is compelling evidence of the kind relevant to judgments on social institutions."

The values of the culture, Justice Frankfurter added, can often be detected *from the practices in the states*. He illustrated the point in this fashion: "The manner in which the states have dealt with this problem furnishes a fair reflection, for purposes of the Due Process Clause, of the underlying feelings of our society about the treatment of persons

who become insane while under sentence of death."

In reviewing the ruling of the Georgia Supreme Court which abated both films as a *matter of law*, this Court should judicially recognize that it was in the background of this Nation's well-established and shared ethical values that the producers of those films opted to move into the motion picture entertainment field and capitalize commercially via sensationalism, upon the natural abhorrence of civilized government to public displays of explicit sexual conduct. *One just does not fornicate in public, be it actual or simulated* – nor may he on the public screen. (See Judge Burke's opinion, infra at page 93 .) The relevant historical facts under consideration certainly encompass this Nation's ethical values, as reflected in the well-knit pattern of city, state and federal laws relating to public sexual conduct (such as laws dealing with nudity, fornication, prostitution, indecent exposure, sodomy, solicitation of unnatural sex act, etc.) Those values exist for the benefit of the family unit which is at the very core of government in our Judaeo-Christian culture and are deserving of this Court's strong support.

The common standards of right and wrong embodied in the statutory law of Georgia should be applied as the rule of law in this case in upholding the Georgia Supreme Court's finding that the films "It All Comes Out In The End" and "Magic Mirror" are UNLAWFUL AS A MATTER OF LAW. This was the view of the unanimous Ohio Court in *City of Youngstown v. De Loreto*, 251 N.E.2d 491 (September 10, 1969). In *De Loreto*, the court enumerated the state statutes and city ordinances which prohibited specific immoral conduct. From that the court deduced what the Moral Standards of Ohio People on Sex were. (See *De Loreto* at pages 500

and 501. See also *Ohio ex rel Ewing v. "Without A Stitch"*, 276 N.E.2d 655 at 659 (July 9, 1971) and *Ohio ex rel Keating v. "Vixen"*, 272 N.E.2d 137 at 141 (July 21, 1971).

It is the prerogative of this Court to take judicial notice of the laws of the State of Georgia relating to sexual morality and apply them in reviewing the issue of obscenity in this case.

The vast history of the Common Law and the statutes of the State of Georgia make clear those particular areas of public conduct which are so immoral, so contrary to the immemorial custom of propriety of the people, so opposite to the natural sense of conscience and justice of the people, so pervasively at odds with the community notions of right and wrong, so consistently maintained as illegal and contrary to Anglo-American public policy that their display and exhibition to the public, either live or recorded, is UNLAWFUL AS A MATTER OF LAW. Obscenity, public indecency, incest, lewdness, immoral exhibitions, sexual perversion, and sodomy et seq., all are enumerated acts the public portrayal of which a judge should recognize as being part of the Common Law specification of "obscenity." See Appendix B. – 4 "Georgia."

The courts have always been willing to take judicial notice of those facts and policies that are of general and incontrovertible knowledge. Such matters include those facts of a common or general knowledge that are well and authoritatively settled, not doubtful or uncertain, and known to be within the limits of the jurisdiction of the court. (28 Am. Jur.2d Sec. 34) They also have included a recognition of the ordinary instincts, passions, emotions, and motives which universally, in a greater or lesser degree, influence the actions and conduct of mankind. (28 Am.Jur.2d Sec. 114)

In addition, judicial notice has been extended to matters of public and social welfare (29 Am.Jur.2d Sec. 143) and the customs and usages of man which are generally known or accepted to an extent sufficient to make them matters of common knowledge. (28 Am.Jr.2d Sec. 121)

2. THE PERFORMANCE OF SEXUAL INTERCOURSE IN PUBLIC, WHETHER REAL OR SIMULATED, LIVE, OR AS PART OF A MOTION PICTURE FILM OR STAGE PLAY IS AGAINST PUBLIC POLICY AND AS SUCH IS OBSCENE PER SE:

By far the best legal opinion on this point of law is that of Judge Burke's speaking for the majority of the New York Court of Appeals in *Trans-Lux Dist. Corp. v. Bd. of Regents*, 248 N.Y.S.2d 857 (Mar. 26, 1964), at page 857:

"While typically applicable to 'speech' and 'press' in the forms known to the framers, the guarantee of the First Amendment has been read to include anything that is asserted to be someone's way of saying something. The most familiar instances of this application are physical conduct and motion pictures (Thornhill v. Alabama, 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093; Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 72 S.Ct. 777, 96 L.Ed. 1098, supra). Cases involving conduct as a form of expression have been frequent in labor law and provide a useful illustration of the transition from a somewhat doctrinaire application of the First Amendment (see e.g., Thornhill v. Alabama, 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093, supra) to a realization that, while conduct may be speech, it still remains conduct and does not cease to present its unique problems of

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. 73-557

BILLY JENKINS,
Appellant

v.

STATE OF GEORGIA,
Appellee

On Appeal from the Supreme Court of Georgia

SUPPLEMENTAL BRIEF FOR APPELLANT

Appellant Billy Jenkins respectfully submits this Supplemental Brief, and shows the following:

The arguments advanced in the Brief for Appellee are essentially the same as those advanced in Appellee's Motion to Dismiss or Affirm this appeal. Appellant has already responded to those arguments in his Reply to Appellee's Motion, and, rather than burdening this Court with repitition, respectfully directs its attention to that Reply.

Appellant files this Supplemental Brief for the purpose of calling the Court's attention to two obscenity cases decided by the Supreme Court of Georgia after the Brief for Appellant was filed on January 23, 1974. *Sanders* v. *State*, — Ga. —, — S.E.2d — (January 28, 1974); *S.S.W. Corporation* v. *Slaton*, — Ga. —, —

S.E.2d — (February 18, 1974). These decisions are reprinted in full in the Appendix hereto.

The Supreme Court of Georgia's decision in the instant case, *Jenkins* v. *State*, 230 Ga. 726, 199 S.E.2d 183 (July 2, 1973), was the first of the four post-*Miller* obscenity decisions which to date have been handed down by that Court. In *Jenkins*, the Court held that Georgia Code Ann. §26-2105 (exhibition of a film portraying acts which would constitute "public indecency")[1] should be "construed together" (JA 53) with Georgia Code Ann. §26-2101(b) (obscenity).

The Supreme Court of Georgia's three subsequent obscenity decisions involved §26-2101(b) alone; they did *not* involve §26-2105.

In the first of these, *Slaton* v. *Paris Adult Theatre I*, 231, Ga. 312, 201 S.E.2d 456 (October 30, 1973), petition for certiorari pending (No. 73-1161), the Court held that, *as of 1971*, §26-2101(b) had already been limited in application to material portraying types of conduct[2] different from those encompassed by §26-2105.

It is Appellant's contention that, because of the different types of conduct to which §§26-2105 and 26-

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[1] The acts encompassed by §26-2105 are enumerated in Georgia Code Ann. §26-2011 — "An act of sexual intercourse," "A lewd exposure of the sexual organs," "A lewd appearance in a state of partial or complete nudity," and "A lewd caress or indecent fondling of the body of another person."

[2] "[A]cts of sexual intercourse, natural, unnatural, bizarre, and violent" and "[A]ctual sexual activity, both natural and unnatural." (231 Ga. at 315, 201 S.E.2d at .)

2101(b) apply, it is impossible to determine what §26-2105 proscribes when it is "construed together" with §26-2101(b). See Brief for Appellant, pages 32-37.

The Supreme Court of Georgia's two most recent obscenity decisions, *Sanders*[3] and *S.S.W.*,[4] reaffirm the constitutionality of §26-2101(b) as construed in the *Paris* case. It is Appellant's view that the *Sanders* and *S.S.W.* decisions further highlight the fact that Georgia Code Ann. §26-2105 is hopelessly void for vagueness when it is "construed together" with §26-2101(b).

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[3] See pages 5, 10 of the Appendix hereto for the Supreme Court of Georgia's discussion of the obscenity test in *Sanders*.

[4] See page 13 of the Appendix hereto for the Supreme Court of Georgia's discussion of the obscenity test in *S.S.W.*

CONCLUSION

For the reasons set forth above and in the Brief for Appellant, the judgment of the Supreme Court of Georgia violates the First and Fourteenth Amendments to the United States Constitution, and therefore must be reversed.

Respectfully submitted,

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APPENDIX

IN THE

SUPREME COURT OF GEORGIA

Decided: January 28, 1974

28352 SANDERS v. STATE OF GEORGIA

INGRAM, Justice. The District Attorney for the Stone Mountain Judicial Circuit filed suit on behalf of the State of Georgia against Arthur R. Sanders, Jr., doing business as "Adult Book Store," together with other named individuals, seeking to have the business of Sanders declared a public nuisance and to obtain an injunction against its continued operation in violation of Section 2 of Ga. L. 1971, p. 888 (Code Ann. §23-3402) and a certain DeKalb County ordinance, Code of DeKalb County, Part II, Chap. 10, Art. VI.[1] A hearing was conducted by the trial court as trior of law and fact, and thereafter the following judgment was rendered:

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[1] Code §§ 23-3402 and 23-3403 (Ga. L. 1971, pp. 888, 889), incorporated in the DeKalb County ordinance, provide:

"Each adult bookstore and adult movie house is hereby prohibited from operating within 200 yards of any church, church book store, public park, public housing project, hospital, school (Public or private), college, recreation center or private residence. The governing authority of each county and municipality is hereby authorized to enact, for their respective jurisdictions, ordinances relating to the subject of this section.

"The term 'adult bookstore' shall mean any commercial establishment in which is offered for sale any book or publication, film or other medium which depicts nudity or sexual conduct.

"The term 'adult movie house' shall mean any movie theater

"*Findings of Fact*

"Plaintiff, the State of Georgia, by and through the office of the District Attorney of the Stone Mountain Judicial Circuit filed a petition with an amendment thereto alleging that the named defendants were engaged in the occupation of operating an adult book store on the premises located at 1815 Candler Road, that it was a commercial establishment which offered for sale books, publications and other media which depict nudity and sexual conduct;

"That the operation of this adult book store is in violation of Georgia Code Annotated 23-3402 and of a DeKalb County ordinance which was made a part of this petition and marked Exhibit A;

"That the operation was done without a valid business license and that the operation constituted a public nuisance which should be abated by law;

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which on a regular, continuing basis shows films rated X by the Motion Picture Coding Association of America, or any movie theater which presents for public viewing on a regular, continuing basis so-called 'adult films' depicting sexual conduct.

"The term 'sexual conduct' shall mean acts of masturbation, homosexuality, sodomy, sexual intercourse, or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks or, if such person be female, breast.

"The term 'nudity' shall mean the showing of the human male or female genitals or pubic area with less than a full opaque covering, or the depiction of covered male genitals in a discernibly turgid state."

The ordinance additionally provides for licensing of adult book stores and movie houses, together with various regulatory provisions. Under Code Ann. § 23-9915 and § XII of the ordinance criminal sanctions may be imposed for violation of the provisions.

"That the operation is in violation of Code Section 26-2101 of the Criminal Code of Georgia in that obscene materials are being sold, distributed, exhibited and otherwise disseminated to persons other than the defendants and the obscene materials were possessed by the defendants in and upon said premises with the intent to sell, distribute and otherwise disseminate the same to other persons and the defendants were aware of and knew the obscene nature of said obscene materials.

"The plaintiff introduced some six exhibits, three of which were material sold and maintained for sale by the defendants. Defendants contended that under the Code Section and under the ordinance, all of the various places in the county selling certain publications of general circulation would be in violation of said ordinance and said Code Section.

"Defendants contend that any interference with their operation would be in violation of the First Amendment of the Constitution of the United States, that the ordinance of DeKalb County was promulgated after the defendants began business and was, therefore, ex post facto.

"The defendants further contended that the statutes and ordinance are repugnant to the First, Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States and that said provisions are void because of vagueness and impermissible overbreadth. The defendants admit that they sell and possess for sale State's Exhibits 4, 5 and 6.

"*Conclusions of Law*

"The court finds that the said book store was oper-

ating within 200 yards of some 29 residences, a church and a church book store.

"The court finds that the three exhibits heretofore mentioned come within the definition of Code Section 23-3403 and that the defendant has admitted having the three exhibits and having them for the purpose of sale as well as having an unknown number of other copies of said same exhibits.

"The court finds that State's Exhibit Number 5 comes within the Obscenity Statute.

"Wherefore, 1 — The court hereby restrains and enjoins said adult book store from operating and restrains and enjoins the defendants from operating said adult book store.

"2 — The Sheriff of DeKalb County is hereby directed to abate said public nuisance and padlock said premises until further order of this court.

"3 — That said defendants were operating without a valid license from DeKalb County, Georgia."

The judgment of the trial court has been appealed to this court and presents for resolution two central issues. These are:

(1) Whether Section 2 of Ga. L. 1971, pp. 344, 345 (Code Ann. § 26-2103) represents an unconstitutional prior restraint when construed and applied to authorize the permanent closure of the book store as a public nuisance upon a finding that a single publication, obscene under the standards of Code Ann. § 26-2101 (b), was sold on its premises; and,

(2) whether Section 2 of Ga. L. 1971, pp. 888, 889 (Code Ann. § 23-3402) and the DeKalb County ordinance (Code of DeKalb County, Part II, Chap. 10, Art. VI) are unconstitutional facially and as applied because they are overly broad and therefore void as an infringement of free speech and expression.

I

Section 2 of Ga. L. 1971, pp. 344, 345 (Code Ann. § 26-2103) provides, "The use of any premises in violation of any of the provisions of this Chapter [Code Chap. 26-21] shall constitute a public nuisance." The Chapter referred to in this Code Section is that part of the Code dealing with obscene materials. Section 26-2101 (b) of this Chapter was recently construed and upheld by this court in *Slaton v. Paris Adult Theatre*, 231 Ga. 312 (SE2d) (1973). We note that if premises are used to sell or distribute material and film which are obscene under § 26-2101 (b), such premises constitute a public nuisance under § 26-2103 of the Code.

The problem encountered in applying these laws in this case to justify closing the entire book store is the ancient right of free men to say and print what they wish without prior restraint. Blackstone put it succinctly in these words: "Every free man has an undoubted right to lay what sentiments he pleases before the public; to forbid this is to destroy the freedom of the press; but if he publishes what is improper, mischievous, or illegal, he must take the consequences of his own temerity." 4 Blackstone, Commentaries, 151, 152. This principle has found expression in Art. I, § I, Par

XV (Code § 2-115) of the Georgia Constitution, providing, "No law shall ever be passed to curtail, or restrain the liberty of speech, or of the press; any person may speak, write and publish his sentiments, on all subjects, being responsible for the abuse of that liberty." The First Amendment to the Federal Constitution also provides that: "Congress shall make no law . . . abridging the freedom of speech or of the press."

Free expression is rooted deeply in our way of life and cannot be suppressed through statutes which compromise the exercise of this freedom. This does not mean that one is free to express obscenity. Injunctive procedures are available to stop obscene expressions. Walter v. Slaton, 227 Ga. 676 (182 SE2d 464) (1971); Evans Theatre Corp. v. Slaton, 227 Ga. 377 (180 SE2d 712) (1971); Slaton v. Paris Adult Theatre I, 231 Ga. 312 (SE2d) (1973).

In *Kingsley Books, Inc. v. Brown*, 354 U. S. 436 (1957) the Supreme Court of the United States disregarded the notion once held that the doctrine of prior restraint did not apply to attempts to enforce "the primary requirements of decency . . . against obscene publications." See Near v. Minnesota, 283 U. S. 697, 716 (1931). The Court, in *Kingsley Books*, authorized a temporary injunction to preserve the status quo pending adjudication of obscenity and declared such a procedure was acceptable if there were procedural safeguards which prevented serious and long-lasting suppression before a final judicial determination of obscenity was made. See, also, *Bantam Books, Inc. v. Sullivan*, 372 U. S. 58 (1963). In other cases before the Court, *Freedman v. Maryland*, 372 U.S. 51 (1965); *Teitel Film Corp. v. Cusack*, 390 U. S. 139 (1961);

and *Blount v. Rizzi*, 400 U. S. 410 (1971), three procedural prerequisites were further evolved respecting the suppression or seizure of materials of film alleged obscene without doing damage to the doctrine of prior restraint. Summarized, they are: (1) in each case the government must institute judicial proceedings whereby the material or film is seized or suppressed, and it must further bear the burden of proof of the obscenity of the material or film; (2) the goverment-instituted proceeding must place the defendant exhibitor or seller on notice as to what film or publication he has exhibited, sold or held for sale that the government seeks to seize or suppress; and (3) the proceeding must provide for a prompt and final judicial determination of the obscenity of the film or material. Temporary restraints to preserve the status quo in this regard are authorized after an adversary hearing and when followed by a prompt final determination of obscenity. See, also, Paris Adult Theatre I v. Slaton, 413 U. S. 49 (1973). For cases involving seizures under warrant, see *Heller v. New York*, 93 S. Ct. 2789 (1973); *Roaden v. Kentucky*, 93 S. Ct. 2796 (1973); *A Quantity of Copies of Books v. Kansas*, 378 U. S. 205 (1964); and *Marcus v. Search Warrants of Property*, 367 U. S. 717 (1961).

One obscene book on the premises of a book store does not make an entire store obscene. The injunction closing this store and padlocking it as a public nuisance necessarily halted the future sale and distribution of other printed material which may not be obscene, thereby precluding the application of the above procedural safeguards and creating an unconstitutional restraint upon appellant. This broad result cannot be reconciled with free expression under our Constitutions. As said

in the case of *Organization for a Better Austin v. Keefe*, 402 U. S. 415 (1971): An "injunction, so far as it imposes prior restraint on speech and publication constitutes an impermissible restraint on First Amendment rights. [And it is impermissible where it] operates, not to redress alleged private wrongs, but to *suppress*, on the basis of previous publications, *distributions of literature of 'any kind'* . . ." 402 U. S. at 418 (Emphasis added). Section 2 of Ga. L. 1971, pp. 344, 345 (Code Ann. § 26-2103), insofar as it has been applied in the present case to authorize the permanent closure of appellant's book store, is unconstitutional.

II

The remaining issue for decision is the constitutionality of Section 2 of Ga. L. 1971, pp. 888, 889 (Code Ann. § 23-3402) and the DeKalb County ordinance (Code of DeKalb County, Part II, Chap. 10, Art. VI) here involved. Both attempt to regulate expression which, as defined, is not obscene, and to impose criminal and civil sanctions upon its exercise if done so within 200 yards of churches, schools, etc. In Slaton v. Paris Adult Theatre, supra, this court interpreted Code Ann. § 26-2101 (b) which defines obscenity in Georgia. In that case, we determined the limits upon the kind of expression that could be punished criminally and subjected to civil suppression without offending constitutional rights. It necessarily follows that expression outside the defined area is constitutionally protected expression. This means that any statute or ordinance which seeks to impose criminal or civil sanctions for the exercise of expression that is not obscene cannot withstand a proper constitutional attack for overbreadth. Cf. Gooding v. Wilson, 205 U. S. 518 (1972).

It is to be noted that, like any other book store, this one is subject to reasonable regulation, zoning and licensing under the police power of the State and its subdivisions. However, the overly broad coverage contemplated by this statute and ordinance creates a chilling effect upon the exercise of free expression. We cannot throw out the protected to rid ourselves of the unprotected as these laws would require. To apply this statute and ordinance literally to the appellant's book store creates an *in terrorem* effect on the exercise of freedoms guaranteed and cherished under both State and Federal Constitutions. We must use the deft, the precise and the remedial incision of the surgeon rather than the bludgeoning blow of the butcher to cut away cancerous obscenity. If we do not, the body politic will suffer too mortal a blow from our zeal to have a decent society free of obscene publications but otherwise full of poetry and prose.

We hold, therefore, that both Section 2 of Ga. L. 1971, pp. 888, 889 (Code Ann. § 23-3402) and the DeKalb County ordinance (Code of DeKalb County, Part II, Chap. 10, Art. VI) are unconstitutional on their face for overbreadth, through the imposition of criminal and civil sanctions for the exercise of otherwise protected speech and expression.

III

An independent appellate review has been conducted of State's Exhibits 4, 5 and 6,[2] introduced by the

[2] State's Exhibition No. 4 is a xeroxed copy of a magazine entitled "Buttocks Bazaar", Vol. 1, No. 3 (Rainbow Publications, Mays Landing, 1972); State's Exhibit No. 5 is a copy of a paperback book entitled "Housewives Who Invite Rape"

State during the hearing below, and under the standards of this court's ruling in Slaton v. Paris Adult Theatre I, 231 Ga. 312 (SE2d) (1973), we have determined each of these exhibits is obscene. These publications depict in varying degrees nude males and females with prominently exposed genitalia. Exhibit 5 included photographs of couples engaged in sexual intercourse and fellatio. The trial court is directed to enter an appropriate order permanently enjoining the exhibition, sale and distribution of these publications, together with all copies thereof.

Judgment reversed; remanded with direction. All the Justices concur except Jordan, J., who dissents.

(Greenleaf Classics, Inc., San Diego, 1972); and State's Exhibit No. 6 is a magazine entitled "Cover Girl, an International Art Magazine" (Nordisk Bladcentral A/S, Copenhagen, 1968).

IN THE
SUPREME COURT OF GEORGIA

Decided: February 18, 1974

28400. S.S.W. CORP., et al. v. SLATON

GUNTER, Justice. This appeal is from a judgment granting a temporary injunction until further order of the court against the appellants. The temporary injunction prohibited them from continuing the showing of the motion picture "Deep Throat" to theatre audiences in Fulton County.

Appellants sought an order from the trial court superseding the temporary injunction pending a final determination of the case. Supersedeas was denied by the trial court, the effect of such denial being to prohibit the showing of the film during the pendency of the case. Appellants then made a motion in the Supreme Court of Georgia for an order superseding the temporary injunction issued by the trial court, and on October 1, 1973, this Court issued its order denying the appellants' application for supersedeas. This Court's order of October 1, 1973, is set forth in the appendix to this opinion.

The appellants have now appealed to this Court, contending that the trial court's temporary injunction

judgment was erroneous. We hold that the granting of a temporary injunction in this case was legally proper, and we affirm the judgment below.

This case began when the District Attorney brought an action against the appellants seeking a declaration that the film was obscene and further seeking a temporary and a permanent injunction to prohibit its further exhibition by the appellants within the jurisdiction of the court. This action was filed on September 6, 1973. The appellants filed responsive motions and pleadings and entered into a stipulation of facts with the District Attorney on September 10, 1973. On that same date, September 10, 1973, an adversary judicial hearing was conducted by the trial judge. Evidence was introduced, the trial judge personally viewed the film, and argument by counsel for the parties was heard. Following this hearing the trial judge rendered findings of fact and conclusions of law to the effect that the film was obscene as defined by Georgia law, and he entered a judgment temporarily enjoining further exhibition of the film until further order of the court. Motions by the appellants to supersede this judgment were then denied by the trial judge and by this Court (on October 1, 1973) as hereinbefore related.

The appellants now make two basic contentions in this appeal: (1) the Georgia statutes which permit suppression of obscenity by the State are unconstitutional, and (2) the temporary suppression of a film, prior to a final judicial determination that it is obscene, constitutes "prior restraint" that is violative of First Amendment rights.

I

In this case there was no suppression by the State of this film until after an adversary judicial hearing. The appellants stipulated that they had been exhibiting the film, and the film itself was viewed by the trial judge at the hearing. The trial judge then found that this film was obscene pursuant to Ga. Code § 26-2101, that its exhibition constituted a crime pursuant to Ga. Code § 26-2101, and he temporarily enjoined its further exhibition.

In Slaton v. Paris Adult Theatre, 231 Ga. 312, — SE 2d —, (decided October 30, 1973), this Court upheld the constitutionality of this Georgia statute after having reviewed it in the light of Miller v. California, 413 US 15, and other decisions of the Supreme Court of the United States referred to. We now hold again that Code § 26-2101 is not unconstitutional; the trial judge was duly authorized to use the definition of obscenity contained therein; the exhibition of a film falling within this definition is a crime pursuant to the statute; and the further exhibition of such a film can be enjoined.

II

We now turn to the contention that an interlocutory or temporary injunction prohibiting the continued showing of a film, prior to a final judicial determination that the film is obscene, is a "prior restraint" that is violative of First Amendment rights.

"It is now firmly established that 'obscenity' is not protected by the free speech clause of the First

Amendment and may be regulated by the State. (Cits)." Slaton v. Paris Adult Theatre, 231 Ga. at 314.

In this case the temporary injunction was not entered on the basis of mere "probable cause" that the film was obscene. An adversary judicial hearing was conducted by a trial judge, he viewed the film itself, and he determined that the film was obscene within the meaning of Georgia law. He then entered a temporary injunction prohibiting the further showing of the film until further order of the court. A trial judge is authorized to perform this function under the law of Georgia, and we hold that what occurred in this case amounted to an interlocutory judicial determination that the film was obscene. An interlocutory judicial determination that material is obscene is not the equivalent of "probable cause" that material may be obscene.

We acknowledge that interlocutory judicial restraint with respect to a First Amendment claim must be reasonable and should be followed as promptly as is practicable by a final judicial determination of First Amendment issues. We tried to say this as plainly as we knew how in this Court's order of October 1, 1973, denying the motion for supersedeas in this case (See appendix).

But for this Court to hold that a film, judicially determined to be obscene at a preliminary hearing, cannot be suppressed during the pendency of the litigation as to whether it is obscene or not would effectively deny the State the right to suppress the showing of an obscene film. This is so because without the possibility of interlocutory prohibition, a film, ultimately adjudged to be obscene, could be shown during the many

months and years of trial and appellate litigation permitted by our system before a judgment is absolutely final.

Obscenity is not protected by the First Amendment, and after a preliminary judicial determination that material is obscene, such material is not protected during the course of the litigation on its way to a final judgment. In short, we hold that interlocutory judicial restraint of obscene material, with adequate provision being made that First Amendment claims can proceed to final judgment at the earliest practicable date, is not violative of First Amendment rights.

Such safeguards were accorded to the appellants in this case by this Court's order of October 1, 1973 (See appendix).

The judgment rendered by the trial court was correct.

Judgement affirmed. All the Justices concur.

APPENDIX

[Part of Opinion of the Supreme Court of Georgia]

IN THE

SUPREME COURT OF GEORGIA

Decided: October 1, 1973

28400. S.S.W. CORPORATION, et al. v. SLATON

ORDER ON SUPERSEDEAS APPLICATION

Per Curiam. The defendants below have moved in this Court for an order superseding an order entered in the trial court temporarily enjoining the defendants from showing the motion picture "Deep Throat" within the jurisdiction of the trial court pending a final determination in the trial court whether a permanent injunction should or should not be entered.

The temporary injunction sought to be superseded here was entered by the trial court only after an adversary judicial hearing. The trial judge made a preliminary judicial determination that the film is obscene-pornographic as defined by Georgia law, and he therefore temporarily enjoined the defendants from further displaying the film until further order of the trial court.

The purpose of the movant's motion here is to have this Court supersede that temporary injunction so as

to permit the continued showing of the film pending a final judgment in the case.

Action by the State that may constitute "prior restraint" against material that may or may not be protected by the First Amendment is not favored. However, prior judicial restraint, after an adversary hearing, is constitutionally permissible if the material alleged to be protected by the First Amendment is material that is alleged to be obscene and pornographic. But even in such a case prior judicial restraint of a temporary nature must be followed by a final determination of First Amendment issues at the earliest practicable date following the entry of a temporary injunction. Such a reasonable procedure is necessary in order to avoid prior restraint of a temporary nature being used to prolong the final and permanent determination of First Amendment issues raised.

This Court therefore declines to grant the motion for supersedeas in the instant case; but the trial court is directed to place the case at the head of the trial calendar and proceed with a trial that will lead to a final judgment at the earliest practicable date.

If a final judgment in the case has not been entered by the trial court within sixty days from the date of this Order, then this Court will entertain a second motion on the part of the defendants seeking an Order by this Court to supersede the temporary injunction entered by the trial court.

The Clerk of this Court shall serve a copy of this Order upon counsel for the parties and upon the trial judge in the court below.

It is so ordered.

CERTIFICATE OF SERVICE

I hereby certify that I have served three copies each of this Supplemental Brief for Appellant upon counsel for Appellee, Mr. William S. Lee, District Attorney, Dougherty County Courthouse, Albany, Georgia 31701, and Mr. Tony H. Hight, Suite 406, 501 Pulliam Street, Atlanta, Georgia 30312, by depositing copies of said Supplemental Brief for Appellant in the United States Mail, properly addressed and with sufficient postage thereon to insure delivery first class.

I hereby certify that all parties required to be served have been served.

This ... day of March, 1974.

TENCH C. COXE
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NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

JENKINS *v.* GEORGIA

APPEAL FROM THE SUPREME COURT OF GEORGIA

No. 73-557. Argued April 15, 1974—Decided June 24, 1974

Appellant was convicted, prior to the announcement of *Miller* v. *California*, 413 U. S. 15, and companion cases, of violating Georgia's obscenity statute for showing the film "Carnal Knowledge" in a motion picture theater. The jury had been instructed on obscenity under that statute, which defines obscene material in terms similar to the definition in *Memoirs* v. *Massachusetts*, 383 U. S. 413, 418. The Georgia Supreme Court affirmed. *Held:*

1. Appellant, whose conviction was on appeal at the time of the announcement of *Miller*, is entitled to any benefit available thereunder. *Hamling* v. *United States*, *ante*, p. —. P. 2.

2. There is no constitutional requirement that juries be instructed in state obscenity cases to apply the standards of a hypothetical statewide community—*Miller* approving, but not mandating, such an instruction; and jurors may properly be instructed to apply "community standards," without a specification of the "community" by the trial court. Pp. 3–4.

3. The film is not obscene under the constitutional standards announced in *Miller* and appellant's conviction therefore contravened the First and Fourteenth Amendments. Pp. 4–8.

(a) Juries do not have unbridled discretion in determining what is "patently offensive" since "no one will be subject to prosecution for the sale or exposure of obscene materials [that do not] depict or describe patently offensive 'hard core' sexual conduct . . . ." *Miller*, *supra*, at 27. P. 7.

(b) This Court's own view of the film impels the conclusion that the film's depiction of sexual conduct is not patently offensive. The camera does not focus on the bodies of actors during scenes of "ultimate sexual acts," nor are the actors' genitals exhibited during those scenes. The film shows occasional nudity,

Syllabus

but nudity alone does not render material obscene under *Miller's* standards. Pp. 7–8.

230 Ga. 726, 199 S. E. 2d 183, reversed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, and POWELL, JJ., joined. DOUGLAS, J., filed a statement concurring in the result. BRENNAN, J., filed an opinion concurring in the result, in which STEWART and MARSHALL, JJ., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 73–557

Billy Jenkins, Appellant, v. State of Georgia.	On Appeal from the Supreme Court of Georgia.

[June 24, 1974]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Appellant was convicted in Georgia of the crime of distributing obscene material. His conviction, in March 1972, was for showing the film "Carnal Knowledge" in a movie theater in Albany, Georgia. The jury that found appellant guilty was instructed on obscenity pursuant to the Georgia statute, which defines obscene material in language similar to that of the definition of obscenity set forth in this Court's plurality opinion in *Memoirs* v. *Massachusetts*, 383 U. S. 413, 418 (1966):

> "Material is obscene if considered as a whole applying community standards, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and utterly without redeeming social value and if, in addition, it goes substantially beyond customary limits of candor in describing or representing such matters." Ga. Code Ann. § 26–2101 (b) (1972).[1]

[1] Section 26–2101 is entitled "Distributing obscene materials." Subsection (a) of § 26–2101 provides in relevant part: "A person commits the offense of distributing obscene materials when he . . . exhibits or otherwise disseminates to any person any obscene material of any description, knowing the obscene nature thereof . . . ." Subsection (c) of § 26–2101 provides that "material, not otherwise

We hold today in *Hamling* v. *United States*, *ante*, p. —, that defendants convicted prior to the announcement of our *Miller* decisions but whose convictions were on direct appeal at that time should receive any benefit available to them from those decisions. We conclude here that the film "Carnal Knowledge" is not obscene under the constitutional standards announced in *Miller* v. *California*, 413 U. S. 15 (1973), and that the First and Fourteenth Amendments therefore require that the judgment of the Supreme Court of Georgia affirming appellant's conviction be reversed.

Appellant was the manager of the theater in which "Carnal Knowledge" was being shown. While he was exhibiting the film on January 13, 1972, local law enforcement officers seized it pursuant to a search warrant. Appellant was later indicted by a grand jury for the offense of distributing obscene material.[2] After his trial in the Su-

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obscene, may be obscene under this section if the distribution thereof . . . is a commercial exploitation of erotica solely for the sake of their prurient appeal." Subsection (d) provides that a first offense under the section shall be punished as a misdemeanor and that any subsequent offense shall be punished by one to five years' imprisonment and/or a fine not to exceed $5,000.

[2] The indictment, Joint Appendix (J. A.), at 8, charged appellant "with the offense of Distributing Obscene Material" for knowingly exhibiting a motion picture to the general public which contained conduct showing "(a) an act of sexual intercourse, (b) a lewd exposure of the sexual organs, (c) a lewd appearance in a state of partial or complete nudity, (d) a lewd caress or indecent fondling of another person" contrary to the laws of Georgia. The latter quoted language appears in Ga. Code Ann. § 26-2011 (1972), entitled "Public indecency," which makes performance of any of the listed acts in a public place a misdemeanor. Under Ga. Stat. Ann. § 26-2105 (1972), it is a crime to exhibit a motion picture portraying acts which would constitute "public indecency" under § 26-2011 if performed in a public place. Appellant's arrest warrant specified § 26-2105 as the statute he was charged with violating. In view of our

perior Court of Dougherty County, the jury, having seen the film and heard testimony, returned a general verdict of guilty on March 23, 1972.[2] Appellant was fined $750 and sentenced to 12 months' probation. He appealed to the Supreme Court of Georgia, which by a divided vote affirmed the judgment of conviction on July 2, 1973. That court stated that the definition of obscenity contained in the Georgia statute was "considerably more restrictive" than the new test set forth in the recent case of *Miller* v. *California*, *supra*, and that the First Amendment does not protect the commercial exhibition of "hard core" pornography. The dissenting Justices, in addition to other disagreements with the court, thought that "Carnal Knowledge" was entitled to the protection of the First and Fourteenth Amendments. Appellant then appealed to this Court and we noted probable jurisdiction, 414 U. S. 1090 (1973).

We agree with the Supreme Court of Georgia's implicit ruling that the Constitution does not require that juries be instructed in state obscenity cases to apply the standards of a hypothetical statewide community. *Miller* approved the use of such instructions; it did not mandate their use. What *Miller* makes clear is that state juries need not be instructed to apply "national standards." We also agree with the Supreme Court of Georgia's implicit approval of the trial court's instructions directing

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holding today, we need not reach appellant's contention that he was denied due process because the jury was allowed to convict under § 26-2101, while he was charged only with violation of § 26-2105. However, we note that appellant's demurrer to the indictment demonstrates his awareness that he was being charged with the § 26-2101 offense, J. A. 9, and that he requested numerous instructions on obscenity, J. A. 47–49.

[2] Appellant's trial jury was alternatively instructed under subsections (a) and (c) of § 26-2101 (pandering), see n. 1, *supra*, and under § 26-2105, see n. 2, *supra*.

jurors to apply "community standards" without specifying what "community." *Miller* held that it was constitutionally permissible to permit juries to rely on the understanding of the community from which they came as to contemporary community standards, and the States have considerable latitude in framing statutes under this element of the *Miller* decision. A State may choose to define an obscenity offense in terms of "contemporary community standards" as defined in *Miller* without further specification, as was done here, or it may choose to define the standards in more precise geographic terms, as was done by California in *Miller*.

We now turn to the question of whether appellant's exhibition of the film was protected by the First and Fourteenth Amendments, a question which appellee asserts is not properly before us because appellant did not raise it on his state appeal. But whether or not appellant argued this constitutional issue below, it is clear that the Supreme Court of Georgia reached and decided it. That is sufficient under our practice. *Raley* v. *Ohio*, 360 U. S. 423, 436 (1959). We also note that the trial court instructed the jury on charges other than the distribution charge.[4] However, the jury returned a general verdict and appellee does not suggest that appellant's conviction can be sustained on these alternate grounds. Cf. *Stromberg v. California*, 283 U. S. 359, 367–368 (1931).

There is little to be found in the record about the film "Carnal Knowledge" other than the film itself.[5] How-

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[4] See n. 3, *supra*.

[5] Appellant testified that the film was "critically acclaimed as one of the ten best pictures of 1971 and Ann Margret has received an Academy Award nomination for her performance in the picture." He further testified that "Carnal Knowledge" had played in 29 towns in Georgia and that it was booked in 50 or 60 more theaters for spring and summer showing. J. A. 24.

ever, appellant has supplied a variety of information and critical commentary, the authenticity of which appellee does not dispute. The film appeared on many "Ten Best" lists for 1971, the year in which it was released. Many but not all of the reviews were favorable. We believe that the following passage from a review which appeared in the *Saturday Review* is a reasonably accurate description of the film:

> "[It is basically a story] of two young college men, roommates and lifelong friends forever preoccupied with their sex lives. Both are first met as virgins. Nicholson is the more knowledgeable and attractive of the two; speaking colloquially, he is a burgeoning bastard. Art Garfunkel is his friend, the nice but troubled guy straight out of those early Feiffer cartoons, but real. He falls in love with the lovely Susan (Candice Bergen) and unknowingly shares her with his college buddy. As the 'safer' one of the two, he is selected by Susan for marriage.
>
> "The time changes. Both men are in their thirties, pursuing successful careers in New York. Nicholson has been running through an average of a dozen women a year but has never managed to meet the right one, the one with the full bosom, the good legs, the properly rounded bottom. More than that, each and every one is a threat to his malehood and peace of mind, until at last, in a bar, he finds Ann-Margret, an aging bachelor girl with striking cleavage and, quite obviously, something of a past. 'Why don't we shack up?' she suggests. They do and a horrendous relationship ensues, complicated mainly by her paranoidal desire to marry. Meanwhile, what of Garfunkel? The sparks have gone out of his marriage, the sex has lost its savor, and Garfunkel

tries once more. And later, ever more foolishly, again." [6]

Appellee contends essentially that under *Miller* the obscenity *vel non* of the film "Carnal Knowledge" was a question for the jury, and that the jury having resolved the question against appellant, and there being some evidence to support its findings, the judgment of conviction should be affirmed. We turn to the language of *Miller* to evaluate appellee's contention.

Miller states that the questions of what appeals to the "prurient interest" and what is "patently offensive" under the obscenity test which it formulates are "essentially questions of fact." *Id.*, at 30. "When triers of fact are asked to decide whether 'the average person, applying community standards' would consider certain materials 'prurient' it would be unrealistic to require that the answer be based on some abstract formulation .... To require a State to structure obscenity proceedings around evidence of a *national* 'community standard' would be an exercise in futility." 413 U. S., at 30. We held in *Paris Adult Theater I* v. *Slaton*, 413 U. S. 49 (1973), decided on the same day, that expert testimony as to obscenity is not necessary when the films at issue are themselves placed in evidence. *Id.*, at 56.

But all of this does not lead us to agree with the Supreme Court of Georgia's apparent conclusion that the jury's verdict against appellant virtually precluded all further appellate review of appellant's assertion that his exhibition of the film was protected by the First and Fourteenth Amendments. Even though questions of appeal to the "prurient interest" or of patent offensiveness are "essentially questions of fact," it would be a serious misreading of *Miller* to conclude that juries have un-

[6] Review of "Carnal Knowledge by Hollis Alpert, Saturday Review, July 3, 1971, at 18.

bridled discretion in determining what is "patently offensive." Not only did we there say that "the First Amendment values applicable to the States through the Fourteenth Amendment are adequately protected by the ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary," 413 U. S., at 25, but we made it plain that under that holding "no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct . . . ." 413 U. S., at 27.

We also took pains in *Miller* to "give a few plain examples of what a state statute could define for regulation under part (b) of the standard announced," that is, the requirement of patent offensiveness. 413 U. S., at 25. These examples included "representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated," and "representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals." *Ibid.* While this did not purport to be an exhaustive catalog of what juries might find patently offensive, it was certainly intended to fix substantive constitutional limitations, deriving from the First Amendment, on the type of material subject to such a determination. It would be wholly at odds with this aspect of *Miller* to uphold an obscenity conviction based upon a defendant's depiction of a woman with a bare midriff, even though a properly charged jury unanimously agreed on a verdict of guilty.

Our own view of the film satisfies us that "Carnal Knowledge" could not be found under the *Miller* standards to depict sexual conduct in a patently offensive way. Nothing in the movie falls within either of the two examples given in *Miller* of material which may constitutionally be found to meet the "patently offensive" element

of those standards, nor is there anything sufficiently similar to such material to justify similar treatment. While the subject matter of the picture is, in a broader sense, sex, and there are scenes in which sexual conduct including "ultimate sexual acts" is to be understood to be taking place, the camera does not focus on the bodies of the actors at such times. There is no exhibition whatever of the actors' genitals, lewd or otherwise, during these scenes. There are occasional scenes of nudity, but nudity alone is not enough to make material legally obscene under the *Miller* standards.

Appellant's showing of the film "Carnal Knowledge" is simply not the "public portrayal of hard core sexual conduct for its own sake, and for ensuing commercial gain" which we said was punishable in *Miller*. We hold that the film could not, as a matter of constitutional law, be found to depict sexual conduct in a patently offensive way, and that it is therefore not outside the protection of the First and Fourteenth Amendments because it is obscene. No other basis appearing in the record upon which the judgment of conviction can be sustained, we reverse the judgment of the Supreme Court of Georgia.

Reversed.

MR. JUSTICE DOUGLAS, being of the view that any ban on obscenity is prohibited by the First Amendment, made applicable to the States through the Fourteenth, concurs in the reversal of this conviction. See *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49, 70–73 (1973) (DOUGLAS, J., dissenting).

SUPREME COURT OF THE UNITED STATES

No. 73–557

Billy Jenkins, Appellant, v. State of Georgia.	On Appeal from the Supreme Court of Georgia.

[June 24, 1974]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL join, concurring in result.

Adopting a restatement of the *Roth-Memoirs** definition of "obscenity," the Court in *Miller* v. *California*, 413 U. S. 15 (1973), held that obscene material could be regulated, provided that "(a) . . . 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest . . . ; (b) . . . the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) . . . the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." *Miller* v. *California*, *supra*, 413 U. S., at 24. It was my view then—and it remains so—that the Court's reformulation hardly represented a solution to what Mr. Justice Harlan called "the intractable obscenity problem," *Interstate Circuit, Inc.* v. *Dallas*, 390 U. S. 676, 704 (1968) (concurring and dissenting). Today's decision confirms my observation in *Paris Adult Theater I* v. *Slaton*, 413 U. S. 49 (1973), that the Court's new formulation does not extricate us from the mire of

*See *Roth* v. *United States*, 354 U. S. 476 (1957), and *Memoirs* v. *Massachusetts*, 383 U. S. 413 (1966).

case-by-case determinations of obscenity. I there noted that:

> "Ultimately, the reformulation must fail because it still leaves in this Court the responsibility of determining in each case whether the materials are protected by the First Amendment. The Court concedes that even under its restated formulation, the First Amendment interests at stake require 'appellate courts to conduct an independent review of constitutional claims when necessary,' *Miller* v. *California* [413 U. S. 15, 25], citing Mr. Justice Harlan's opinion in *Roth*, where he stated, 'I do not understand how the Court can resolve the constitutional problems now before it without making its own independent judgment upon the character of the material upon which these convictions were based.' 354 U. S., at 498. Thus, the Court's new formulation will not relieve us of 'the awesome task of making case by case at once the criminal and the constitutional law.' And the careful efforts of state and lower federal courts to apply the standard will remain an essentially pointless exercise, in view of the need for an ultimate decision by this Court. In addition, since the status of sexually oriented material will necessarily remain in doubt until final decision by this Court, the new approach will not diminish the chill on protected expression that derives from the uncertainty of the underlying standard. I am convinced that a definition of obscenity in terms of physical conduct cannot provide sufficient clarity to afford fair notice, to avoid a chill on protected expression, and to minimize the institutional stress, so long as that definition is used to justify the outright suppression of any material that is asserted to

fall within its terms." (Footnote omitted.) *Id.*, at 100–101.

After the Court's decision today, there can be no doubt that *Miller* requires appellate courts—including this Court—to review independently the constitutional fact of obscenity. Moreover, the Court's task is not limited to reviewing a jury finding under part (c) of the *Miller* test that "the work, taken as a whole, lack[ed] serious literary, artistic, political, or scientific value." *Miller* also requires independent review of a jury's determination under part (b) of the *Miller* test that "the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law." As the Court notes, *ante*, pp. 6–7,

> "Even though questions of . . . patent offensiveness are 'essentially questions of fact,' it would be a serious misreading of *Miller* to conclude that juries have unbridled discretion in determining what is 'patently offensive.' Not only did we there say that 'the First Amendment values applicable to the States through the Fourteenth Amendment are adequately protected by the ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary,' 413 U. S., at 25, but we made it plain that under that holding 'no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct. . . .' 413 U. S., at 27."

In order to make the review mandated by *Miller*, the Court was required to screen the film Carnal Knowledge and make an independent determination of obscenity *vel non*. Following that review, the Court holds that Carnal Knowledge "could not, as a matter of constitutional law, be found to depict sexual conduct in a patently offensive

way, and that therefore it is not outside the protection of the First and Fourteenth Amendments because it is obscene." *Ante*, p. 8.

Thus, it is clear that as long as the *Miller* test remains in effect "one cannot say with certainty that material is obscene until at least five members of this Court, applying inevitably obscure standards, have pronounced it so." *Paris Adult Theater I* v. *Slaton*, *supra*, 413 U. S., at 92 (BRENNAN, J., dissenting). Because of the attendant uncertainty of such a process and its inevitable institutional stress upon the judiciary, I continue to adhere to my view that, "at least in the absence of distribution to juveniles or obtrusive exposure to unconsenting adults, the First and Fourteenth Amendments prohibit the State and Federal Governments from attempting wholly to suppress sexually oriented materials on the basis of their allegedly 'obscence' contents." *Paris Adult Theater I* v. *Slaton*, *supra*, 413 U. S., at 113 (BRENNAN, J. dissenting). It is clear that, tested by that constitutional standard, the Georgia obscenity statutes under which appellant Jenkins was convicted are constitutionally overbroad and therefore facially invalid. I therefore concur in the Court's judgment reversing Jenkins' conviction.